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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 9

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THE BOWERS HYDRAULIC DREDGING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 29, 1906.

(20,505.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 185.

THE BOWERS HYDRAULIC DREDGING COMPANY, APPELLANT,

vs.

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APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 17, 1907.

1 In the Court of Claims.

No. 22895.

THE BOWERS HYDRAULIC DREDGING COMPANY
vs.
THE UNITED STATES.

I.—*Petition. Filed June* 14, 1902.

To the Honorable Chief Justice and Judges of the Court of Claims:

Your petitioner, The Bowers Hydraulic Dredging Company, respectfully represents:

I.

That it is a corporation existing under the laws of the State of New Jersey, and is a citizen of that State.

II.

That on the 20th day of November, 1899, the petitioner entered into a contract with the United States through Gen. William F. Smith, United States agent, Corps of Engineers, United States Army, who acted for and in behalf of the United States, which con-
2 tract will be introduced and filed in evidence in support of this petition and is made a part hereof by this reference thereto, whereby the petitioner contracted and agreed that it would furnish all labor, machinery, and appliances necessary or proper for the faithful execution of the contract, and would do the work called for by, and in all respects carry out and comply with, the specifications attached to the contract, for dredging in Wilmington Harbor and Christiana River, Delaware; that it would dredge and remove at the rate of not less than four thousand cubic yards daily, and that the dredged material should be properly and securely placed above high water, behind banks, along the line of the Christiana River, in accordance with its proposal dated October 18, 1899, and that in consideration thereof it should receive ten and seven-eighth cents (.10⅞) for each and every cubic yard of material dredged, measured in place, the said price including refill and re-deposit. The specifications and proposal aforesaid will be introduced and filed in evidence and made part hereof by this reference thereto.

III.

That on the 21st day of June, 1901, by a contract in writing entered into by the petitioner and Lieut. Colonel C. W. Raymond, Corps of Engineers, U. S. A., acting for and on behalf of the United States, the said aforesaid contract of November 20, 1899, was modified as follows: The quantity of material to be excavated, removed,

and deposited should be about 1,300,000 cubic yards, meas-
3 ured in place, instead of about 900,000 cubic yards, measured in place, as provided for in the contract aforesaid; that the petitioner should receive in full payment for all additional work done under the supplemental agreement and subject to all the conditions and requirements of the specifications attached to and forming a part of the original contract, as above modified, the sum of ten and seven-eighth cents (.10⅞) per cubic yard, measured in place. The additional work provided for by this supplemental agreement should be completed on or before September 30, 1901. This supplemental agreement will be introduced and filed in evidence in support of this petition, and is made a part hereof by this reference thereto.

IV.

Your petitioner entered upon the performance of the contracts aforesaid, in accordance with their provisions, faithfully carried out, performed, and executed the same to the entire satisfaction and acceptance of the United States; but, notwithstanding such facts, the United States, in violation of the obligations upon it resting, failed to pay the petitioner the contract price aforesaid for the excavation, removal, and deposit of 260,430 cubic yards, which, at the contract price of ten and seven-eighth cents (.10⅞) per cubic yard, amounts to twenty-eight thousand three hundred and twenty-one dollars and seventy-six cents ($28,321.76). The petitioner avers that although it repeatedly requested and demanded of the
4 United States the payment of that amount and asserted repeatedly that such amount was due and unpaid by reason of the premises, yet the United States has failed and still fails and refuses to pay such amount or any part thereof to the petitioner. No other action than this has been taken on this claim in the Departments or in the Congress of the United States.

V.

Your petitioner is the sole owner of the claim, and no other corporation, person, or persons are interested therein, and no assignment or transfer of the claim or any part thereof or interest therein has been made.

VI.

Your petitioner is justly entitled to the amount herein claimed from the United States, as it is advised and believes, after allowing all just credits, set-offs, and demands, and it is believed that the averments of fact as stated in the petition are true.

Wherefore your petitioner prays judgment against the United States for twenty-eight thousand three hundred and twenty-one dollars and seventy-six cents ($28,321.76).

THE BOWERS HYDRAULIC DREDGING COMPANY,
By FRANK C. SOMERS, *President.*

DUDLEY & MICHENER,
Attorneys of Record.

5 & 6 STATE OF NEW JERSEY, *County of Camden, ss:*

Personally appeared before me, a notary public in and for the county and State aforesaid, Frank C. Somers, who, being duly sworn, deposes and says that he is the president of The Bowers Hydraulic Dredging Company, the petitioner aforesaid, and that he has read and understands the foregoing petition; that the matters and facts therein stated and set forth are true, as he is informed and believes.

FRANK C. SOMERS.

Subscribed and sworn to before me this eleventh day of June, A. D. 1902.

HARRY T. NEKERVIS,
[SEAL.] *Notary Public.*

7 II.—*Traverse. Filed February 6, 1906.*

In the Court of Claims of the United States, December Term, A. D. 1906.

No. 22895.

THE BOWERS HYDRAULIC DREDGING COMPANY
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

J. A. VAN ORSDEL,
Assistant Attorney General.

8 III.—*Argument and Submission of Case.*

On the 6th day of February, 1906, this cause came on to be heard, and was argued by Mr. L. T. Michener for claimant and Mr. Philip M. Ashford for the defendants and submitted.

9 IV.—*Findings of Fact and Conclusion of Law, and Opinion. Filed by the Court March 12, 1906.*

THE BOWERS HYDRAULIC DREDGING COMPANY
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The petitioner is a corporation existing under the laws of the State of New Jersey, and is a citizen of that State.

II.

On September 18, 1899, the United States engineer office at Wilmington, Del., through and by William F. Smith, United States agent, invited proposals for dredging and removing about 900,000 cubic yards of material from the Christiani River and Wilmington Harbor, Delaware.

In the advertisement inviting said proposal it was stated that "specifications, blank form, and all available information will be furnished on application to this office."

Specifications for said dredging work were prepared and furnished for the inspection and examination of bidders. In said specifications it was provided as follows:

"32. It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim will be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings, and are invited to make the estimate of quantities for themselves. It is not expected that the actual quantities will vary more than 10 per centum from the estimates.

"37. The project, for the completion of which contracts are authorized in the law above quoted, requires the dredging of the Christiani River to a depth of 21 feet at mean low water from the 21-foot curve in the Delaware River to the upper line of the pulp works; thence to the draw pier of the Shellpot branch, No. 4, of the P., W. & B. R. R., so as to give a depth which gradually diminishes to 10 feet at mean low water at the latter-named place and the removal of shoals having less than seven (7) feet of water over them; thence to Newport—the width to be 250 feet to the mouth of the Brandywine, 200 feet thence to the upper line of the pulp works, and 100 feet above. Work is now in progress under contracts for dredging to a depth of 18 feet up to the pulp works, the width to be made being 200 feet, and for all above-described dredging above the pulp works. The work required under these specifications is the dredging that remains to complete the project additional to that done or to be done under the contracts above referred to until their termination or completion. It is estimated that about 900,000 cubic yards will have to be removed.

"41. No guarantee is given as to the nature of the bottom, but as far as it is known it is sand, mud, clay, and gravel. Bidders are requested to satisfy themselves upon this point and to examine all other local conditions, as it will be assumed that their bids are based upon personal information. No extra allowance will be made for excavating material different from that herein described.

"43. The amount of material removed will be paid for by the cubic yard measured in place, and shall be determined by surveys made before dredging is commenced and after it is completed. All surveys and measurements are to be made under the direction of the engineer in charge by persons employed by him for that purpose. The decision of the engineer in charge as to the amount of material excavated and removed, as well as to its location and deposit, shall be final and without appeal on the part of the contractor.

"44. Payments will be allowed for actual dredging to twenty-one (21) feet below mean low-water level. Work done outside of the designated lines of excavation or below the specified depth will not be paid for, and any material deposited otherwise than specified and agreed upon must be removed by the contractor at his own expense.

"45. The location of the work shall be plainly located by stakes and ranges. The level of mean low water as established by the engineer in charge shall not be changed during the progress of the work. The contractor shall be required to supply the lumber for the necessary stakes and ranges, and shall at all times when called upon furnish men and boats to set them and keep them set under the direction of the inspector, the expense thereof to be included in the contract price for the dredging."

A channel was being excavated in said river by the New York Dredging Company under a contract entered into prior to said advertisement. There were at this time certain maps or drawings in the office of the United States engineer, in addition to the specifications heretofore referred to, which showed the condition of the channel prior to any work being done thereon by the New York Dredging Company; also showing the progress of the work done by the New York Dredging Company; also showing the location of the proposed channel to which said advertisement referred. The drawing showing the proposed channel indicated the shore lines of said river by black irregular lines. The location and limits of the proposed channel were indicated by hatched parallel black lines. The depth of water was indicated by feet and tenths. So far as the New York Dredging Company had proceeded with its contract, the condition in which the channel was left by it was shown on said drawings by cross sections, indicated by transverse irregular black lines.

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The president of the claimant corporation received from the Government blank proposals and a copy of the specifications heretofore referred to some time prior to the date on which the bids were opened. Said president also visited the office of the United States engineer at Wilmington, Del., prior to the opening of the bids, and had an interview with the assistant engineer in charge and with the United States agent. He also acknowledges himself familiar with the specifications, having examined the work under the specifications for the work being done by the New York Dredging Company, which specifications were identical with the specifications in the case at bar so far as relates to the matters in dispute. It does not appear that said president actually examined any or all of the maps then in the office of said United States engineer, but it does appear, and

the court finds as a fact, that said maps and drawings were in said office, subject to inspection and examination by prospective bidders or other interested parties. Thereafter, to wit, on the 18th day of October, 1899, claimant submitted a bid for said work.

III.

On the 20th day of November, 1899, claimant entered into a contract, in writing, with the United States, through Gen. William F. Smith, United States agent, for the execution of the dredging operations, in conformity with the advertisements and specifications referred to in the preceding finding. The contract, among other things, contained the following provision: "That the said Bowers Hydraulic Dredging Company shall furnish all labor, machinery, and appliances necessary or proper for the faithful execution of this contract, and shall do the work called for by, and in all respects carry out and comply with, the said specifications for dredging in Wilmington Harbor and Christiana River, Delaware; that it shall dredge and remove at the rate of not less than four thousand (4,000) cubic yards daily, and that the dredged material shall be properly and securely placed above high water, behind banks along the line of the Christiana River, in accordance with its proposal, dated October 18, 1899, and that in consideration thereof it shall receive 10⅞ cents for each and every cubic yard of material dredged, measured in place, the said price including removal and redeposit."

IV.

On the 21st day of June, 1901, by a contract in writing entered into by the petitioner and Lieut. Col. C. W. Raymond, Corps of Engineers, U. S. Army, acting for and on behalf of the United States, the aforesaid contract of November 20, 1899, was modified as follows: The quantity of material to be excavated, removed, and deposited should be about 1,300,000 cubic yards, measured in place, instead of about 900,000 cubic yards measured in place, as provided for in the contract aforesaid; that the petitioner should receive in full payment for all additional work done under the supplemental agreement, and subject to all the conditions and requirements of the specifications attached to and forming a part of the original contract, as above modified, the sum of ten and
12 seven-eighth cents (.10⅞) per cubic yard, measured in place. The additional work provided for by this supplemental agreement should be completed on or before September 30, 1901.

V.

Petitioner entered upon the performance of the contracts aforesaid in accordance with their provisions and faithfully performed the same to the satisfaction and acceptance of the United States, but in connection with such performance thereof differences arose between the petitioner and the engineer in charge of the work with relation to the meaning of the words "measured in place" used in the contracts and specifications, and as to whether or not the specifi-

cations and contracts included and gave the petitioner the right to demand pay for material dredged, which was derived from the sides or slopes of the excavated channel. Before commencing the work the petitioner addressed a letter to the engineer in charge, Gen. William F. Smith, asking what construction would be placed on the specifications referring to the quantity of material to be paid for. General Smith forwarded this request to the Chief of the Corps of Engineers, U. S. Army, asked for instructions, and that officer instructed him, with the approval of the Secretary of War, to pay only for the material included within the designated line of excavation, and not for such material as should be drawn into the cut as a result of the dredging.

Thereupon and pursuant to such instructions, Gen. William F. Smith, the engineer in charge of the work, wrote to the petitioner the following letter:

"UNITED STATES ENGINEER OFFICE,
"824 ADAMS STREET, WILMINGTON, DEL., *April* 23, 1900.

"Frank C. Somers, Prest. Bowers Hydraulic Dredging Co., Camden, N. J.

"SIR: In reply to your communication of the 17th inst. asking what construction will be placed upon that part of the specifications attached to your contract which refers to the quantity of material to be paid for, you are respectfully informed that payment will be made for the quantity of material removed within the designated lines of excavation as determined by measurements before and after the dredge, and that such measurement does not include material which comes in from the sides during the progress of dredging.

"I deem it proper to add that this is in conformity with the instructions received from the Chief of Engineers on the subject.

"Very respectfully, WM. F. SMITH,
"United States Agent."

To this letter the petitioner replied at length in a letter to Gen. William F. Smith, dated May 4, 1900, which acknowledged the receipt of his letter, and then said:

"We desire to state that such a construction of the contract was not conveyed to us through the specifications for the work, or through any information obtained from your office prior to the submission of our proposal of September 18, 1899, or through any source of information previous to our signing the contract for the work herein referred to. But we would further state your
13 construction of the specifications only came to us through the recent proceedings and action taken by your office in the matter of the claims of the New York Dredging Company upon the same issue as that which has been raised by us.

"We further desire at this time to place on record our protest against the construction which has been given by your letter of April 23, 1900, to that part of the specifications referring to the quantity of material which is to be paid for, and to further state

that the act of our entering upon and prosecuting the work to be done under our contract shall not be construed as an acceptance on our part of the interpretation of the specifications which is given by your letter herein referred to. Neither shall such acts on our part in any manner operate to the prejudice of such proper claims as we may hereafter make in this connection."

Thereafter, and on the occasion of the receipt of each payment made by the Government, the petitioner in returning the receipted voucher wrote a letter placing on record its formal protest against the exclusion from the estimates of materials derived from the proper excavation of the side slopes of the channel, stating that the receipt by the petitioner for the amount of work covered by the vouchers being returned, or others of like tenor, should not be considered as an acknowledgment on its part of the propriety and equity of excluding material from the slopes of the channels under that or future estimates; and saying that such receipts should be without prejudice to its claims in the matter, as set forth in its letter of May 4, 1900, aforesaid. Such written protests were made so long as payments were made and on each occasion thereof.

The United States did not pay the claimant the contract price aforesaid, or any other sum, for the execution, removal, and deposit of any material whatever which came into the rectangular prism from outside the vertical lines thereof, but has steadfastly refused, although demand has often been made therefor, to pay anything for material excavated from outside the vertical lines of the rectangular prism from outside said vertical lines. No other action than this has been taken on this claim in the Departments or in the Congress of the United States.

VI.

The amount of material that fell or slid from the sides or slopes of the vertical walls in front of the dredge and that was removed thereby along with the excavated material within the designated lines for dredging as provided by the contract, was more than 30,000 cubic yards, which, at the contract price of 10⅞ cents per cubic yard, would amount to over $3,000.

VII.

Petitioner is the sole owner of the claim, and no other corporation, person, or persons are interested therein, and no assignment or transfer of the claim, or any part thereof, or interest therein, has been made.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the petition be, and the same is hereby, dismissed.

14 *Opinion.*

ATKINSON, *J.*, delivered the opinion of the court:

The claimant entered into the contract with the United States November 20, 1899, for the excavation of a channel 200 feet wide and 21 feet deep at mean low-water mark in Wilmington Harbor and Christiana River, Delaware, described in the thirty-seventh paragraph of the specifications, which contract was amended by a supplemental agreement dated June 21, 1901, increasing the quantity of material to be dredged, and extending the time for the completion of the work. The contractor was to receive 10⅞ cents per cubic yard for the material removed and deposited as provided in the contract. The amount of material removed was to be determined by measurements or surveys made before the dredging operations were commenced and also after they were completed. The measurements and surveys necessary to determine the quantity were to be made by the engineer in charge, or by persons employed by him for that purpose, and the decision of the engineer in charge as to the amount of material excavated and removed was to be final, and without appeal on the part of the contractor.

Before entering upon the performance of the contract the claimant called upon the engineer in charge for information with reference to the manner and method of making the measurements in question, asking specifically whether or not it was the intention of the engineer in charge to include in the material to be paid for "slope measurements." The engineer in charge duly advised the contractor that in measuring the material to be paid for no account would be taken of the material dredged from outside the designated lines of excavation, and further that in measuring the material to be removed the channel would be treated as a prism with vertical sides and horizontal bottom, and that these vertical sides would be regarded as the "designated lines of excavation."

Upon receipt of this information the contractor filed a written protest with the engineer in charge before entering upon the execution of the contract, and subsequently, at the date of each payment for services performed, protest was duly entered on the ground that the payments so made did not include material from outside the designated lines of excavation as above defined.

Claimant alleges that in the process of the execution of the contract it actually dredged and removed material from the sides of the channel outside of the vertical lines thereof to the amount of 260,430 cubic yards, for which it claims it was entitled to compensation under the contract at the contract price of 10⅞ cents per cubic yard.

The defendants contend that they were not obliged by the terms of the contract to pay the contractor anything for material outside of the vertical sides of the channel to be cut, or below the bottom thereof at the required depth, even though the same was actually and necessarily dredged and deposited by the contractor. In other

words, that the material to be excavated was to be "measured in place."

This suit, therefore, hinges on the phrase *"measured in place."* Section 43 of the specifications, which are made a part of the contract, reads:

"43. The amount of material removed will be paid for by the cubic yard, measured in place, and shall be determined by surveys made before dredging is commenced and after it is completed. All surveys and measurements are to be made under the direction of the engineer in charge by persons employed by him for that purpose. The decision of the engineer in charge as to the amount of material excavated and removed, as well as to its location and deposit, shall be final and without appeal on the part of the contractor."

The decision of the engineer in charge in respect of the quantity of material to be paid for is contained in his letter, set out in Finding V, wherein he says:

"Payment will be made for the quantity of material removed within the designated lines of excavation as determined by measurement before and after the dredge, and that such measurement does not include material which comes in from the sides during the progress of dredging.

"I deem it proper to add that this is in conformity with the instructions received from the chief of engineers on the subject."

The claimant contends that because the engineer in charge submitted the question to the chief of engineers and then advised the claimant that his decision was in conformity with the instructions of that officer; therefore it was not the decision of the engineer in charge. The language of the specification, "The decision of the engineer in charge as to the amount of material excavated and removed, as well as to its location and deposit, shall be final and without appeal on the part of the contractor," entitled the claimant to the decision of that officer, but he was not thereby inhibited from seeking information from his superior officer upon which to base his decision, provided only after he obtained such information the decision rendered was his own. We think the findings show that it was, notwithstanding the statement that the decision was in conformity with the instructions of the chief of engineers on the subject. The decision being in conformity with such instructions adds force to the ruling, as by the language it does not appear that such instructions were not also in harmony with the decision of the engineer in charge. That is to say, from the facts found the court can not conclude that the decision was not that of the engineer in charge, and if not, then the claimant had the benefit of the decision of the engineer in charge in respect of the quantity of material to be paid for, and such decision, it must be held, was final, unless clearly in violation of the terms of the contract.

Referring to the specifications, which are made part of the contract, paragraph 43, quoted above, provides that: "The amount of material removed will be paid for by the cubic yard measured in place," such amount to be determined under the directions of the

engineer in charge, "by surveys made before dredging is commenced and after it is completed."

Here we have the method by which the quantity of material to be excavated is determined, as well as the method of verifying the amount of material removed after the dredging is completed.

Paragraph 45 of the specifications provides that: "The location of the work shall be plainly located by stakes and ranges;" and in order that there should be no mistake about the location from the beginning to the end of the work, the same paragraph continues: "The level of mean low water as established by the engineer in charge shall not be changed during the progress of the work;" and then, as if to make it still clearer what was meant by "measurement in place," paragraph 44 provides: "Payments will be allowed for actual dredging to 21 feet below mean low-water level. *Work done outside of the designated lines of excavation or below the specified depths will not be paid for.*"

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Keeping in mind that the amount of material to be paid for was to be determined within the designated lines by means of surveys made before dredging commenced and verified within those lines after the dredging was completed, makes it clear that the measurements made were not to include any material outside of the designated lines. It necessarily follows that the material falling within the designated lines from the sides or slopes outside of the designated lines during the progress of the work could not have been measured *in place* by the surveys so authorized by the contract to be made.

We are therefore of the opinion that the specifications, which are made part of the contract, are plain and unambiguous, and that they not only furnish the basis of *measurement in place* of the material to be excavated, but that the measurements made by the engineer in charge were in strict accord therewith. This being so, any other method of *measurement in place*, even though customary, is excluded by the terms of the contract, and, therefore, expert testimony is not admissible to explain language that needs no explanation.

Nor is the claimant excused for the failure of its officers and agents to familiarize themselves with the project and the work to be done before making its bid and entering into the contract, for, at the time of making its bid, there were in the office of the engineer, in addition to the specifications, drawings showing the location of the proposed channel by various lines drawn thereon, as set forth in Finding II; and by paragraph 32 of the specifications bidders were expressly notified that they would be "expected to examine the drawings," and they were therein "invited to make the estimate of quantities for themselves;" while by paragraph 37 the amount of materials to be removed was estimated at 900,000 cubic yards.

The attention of the claimant's officers and agents being called to the drawings by the terms of the specifications, it was their duty to have examined such drawings before making their bid; and if they failed so to do, it was, so far as appears from the findings of fact, their own fault. Had they exercised reasonable foresight in

response to the advertisement and the specifications containing directions to bidders, they could readily have ascertained from the drawings that the material estimated did not include any material outside of the lines indicated thereon as provided by the specifications.

It follows from what we have said that the claimant is not entitled to recover, and its petition is therefore dismissed.

BY THE COURT.

17 V.—*Judgment of the Court.*

No. 22895.

THE BOWERS HYDRAULIC DREDGING COMPANY
v.
THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 12th day of March, 1906, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree that the petition of the claimant, the Bowers Hydraulic Dredging Company, be and the same is hereby dismissed.

BY THE COURT.

18 VI.—*Claimant's motion for New Trial and to Amend Findings and Opinion of the Court Overruling Same.*

Motion for New Trial.

Claimant moves the Court for a new trial in this case, for the following reasons:

1. The findings and judgment of the Court are contrary to the law.

2. The findings and judgment of the Court are contrary to the evidence.

3. The Court erred in not finding the trade meaning of the words "measured in place."

4. The court erred in not finding that 260,430 cubic yards fell or slid in from the sides or slopes, which, at the contract price of 10⅞ cents per cubic yard, would amount to $28,321.76.

5. The Court erred in not rendering judgment in favor of the petitioner for $28,321.76.

Motion to Amend Findings.

I. Claimant moves the Court to amend finding III by inserting at the end of that finding all that part of request II which is printed on page 181 of the record, and the four lines at the top of page

182, the same being the trade meaning or understanding of the words "measured in place."

II. Claimant moves that finding VI be amended so as to insert 260,430, instead of "30,000," and 28,321.76, instead of "3,000.00."

III. Claimant moves to amend the conclusion of law, so as to give the claimant judgment for $28,321.76.

Respectfully submitted,

DUDLEY & MICHENER,
Attorneys for Claimant.

Filed March 16, 1906.

19 *Opinion of the Court Overruling Claimant's Motion for New Trial and to Amend Findings.*

THE BOWERS HYDRAULIC DREDGING COMPANY
v.
THE UNITED STATES.

Opinion.

ATKINSON, *J.*, delivered the opinion of the court:

The claimant files a motion herein for a new trial on the grounds, first, that the findings and judgment of the court are contrary to law; second, that the findings and judgment of the court are contrary to the evidence, and, third, that the court erred in not finding the trade meaning of the words "measured in place." And it also asks the court to modify the findings, showing the custom or trade meaning of the words "measured in place."

In respect of the motion for a new trial, as well as to amend the findings, the same is overruled.

The claimant's request for the court to find the custom or trade meaning of the term "measured in place," as used in paragraph 43 of the specifications attached to the contract, was denied by the court in the original findings for the reasons stated in the opinion. The court did not enter into the consideration of the expert evidence offered for and against the custom or trade meaning of the term "measured in place," because the specifications are unambiguous and exclude any other method of measurement for the payment for the material dredged than that provided for in the contract; and for the further reason that paragraph 44 of said specifications provides, in express terms, that "work done outside of the designated lines of excavation, or below the specified depth, will not be paid for."

The custom or trade meaning existing at the time of and respecting work to be done under a contract is never regarded as entering into the contract where the words of the contract provide for the method or manner of doing the work which would otherwise be done in accordance with the custom or trade meaning of a term so used.

In the present case, regarding the specifications, as was said in the

original opinion, they "are plain and unambiguous, and
20 that they not only furnish the basis of measurement in place of the material to be excavated, but that the measurements made by the engineer in charge were in strict accord therewith. This being so, any other method of measurement *in place*, even though customary, is excluded by the terms of the contract, and therefore expert testimony is not admissible to explain language that needs no explanation." For the reasons there given, the court declined to consider the expert testimony as it does now on this motion. (Am. and Eng. Ency. of Law, vol. 21, 1110, and cases cited; Parsons on Contracts, 9th ed., 648, 710, 716; 31 Fed. R., 254, 256; 4 Dillon, 448-459; 196 U. S. R., 157-166; Am. and Eng. Ency. of Law, vol. 17, 11.)

In respect of the argument of plaintiff's counsel relating to the decision of the Government engineer in charge of the work of construction, concerning any controversies which might arise out of the contract in the case before us, we have nothing further to add than was expressed thereon in the former opinion of the court and as set out in Finding V therein.

Adhering to our former decision, the motion of plaintiff, as aforesaid, is therefore overruled.

BY THE COURT.

Filed November 19, 1906.

21 VII.—*Application for, and Allowance of, Appeal.*

No. 22895.

THE BOWERS HYDRAULIC DREDGING COMPANY
vs.
THE UNITED STATES.

Comes now the petitioner, and makes application to the Court for an appeal to the Supreme Court of the United States from the judgment of this Court, herein rendered.

THE BOWERS HYDRAULIC DREDGING CO.,
By DUDLEY & MICHENER,
Attorneys of Record.

Filed December 3, 1906.

On December 3, 1906, it was ordered that this application for appeal be allowed as prayed for.

BY THE COURT.

22 Court of Claims.

No. 22895.

THE BOWERS HYDRAULIC DREDGING COMPANY
v.
THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact, conclusion of law and opinion filed by the Court; of the judgment of the Court dismissing the petition; of the motion of claimant for a new trial and to amend findings and the opinion of the Court overruling same; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 17th day of December, 1906.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

THE BOWERS HYDRAULIC DREDGING COMPANY,
Appellant,
vs.
THE UNITED STATES.

No. 9.

Appeal from the Court of Claims.

APPELLANT'S BRIEF.

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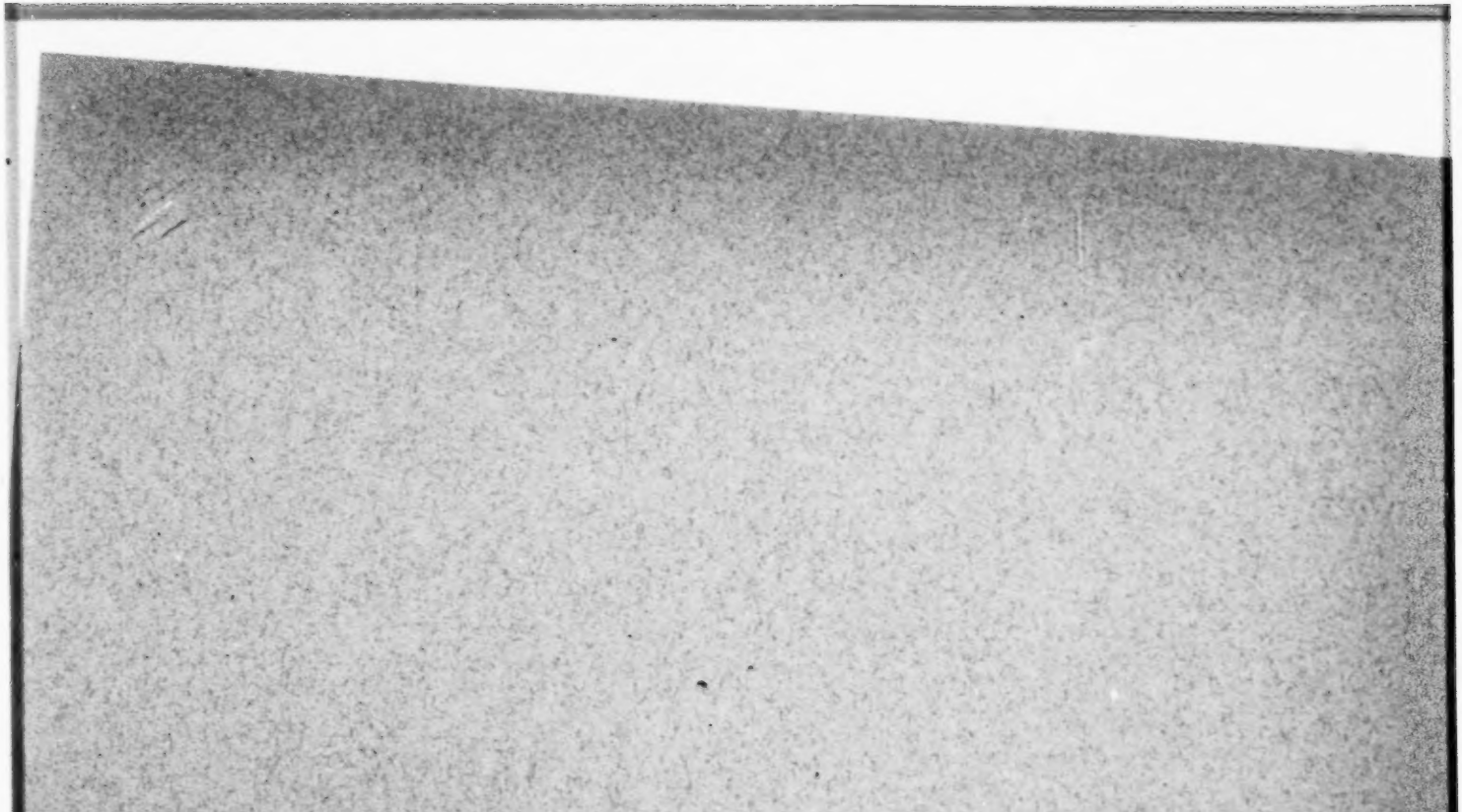

IN THE

Supreme Court of the United States.

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THE BOWERS HYDRAULIC DREDGING COMPANY, *Appellant,*
vs.
THE UNITED STATES.
No. 185.

APPELLANT'S BRIEF.

I.

Statement of Facts.

This is an appeal from the Court of Claims. The case is reported in 41 C. Cls., 214 and 498. The petition alleges a contract between the appellant and the United States, dated November 20, 1899, for dredging in Wilmington Harbor and Christiana River, Delaware. Finding II, Rec. 1. That contract was followed by another, dated June 21, 1901, for an additional amount of dredging in the same harbor and river. Finding III, Rec. 1, 2. The government failed to pay for the dredging, excavation, removal and deposit of 260,430 cubic yards of material, which, at the contract price of 10¾ cents per

cubic yard, amounts to $28,321.76, although repeatedly requested and demanded so to do. (Finding IV, Rec. 2.) That amount was claimed in the petition. Rec. 2, bottom of page.

The contract, specifications and proposal were prepared, drawn and executed by the United States, through William F. Smith, United States agent and engineer in charge of the work. Findings II, III, IV, V, Rec. 4–8. In Finding V, at the bottom of page 6 and top of page 7, it is expressly stated that General William F. Smith was "the engineer in charge." Elsewhere in the findings he bears the designation of "United States agent." In the opinion of the court he is spoken of as "the engineer in charge." (Rec. 9–11.) And in the opinion overruling the motion for new trial, he is spoken of as "the government engineer in charge of the work of construction." There can be no dispute about the fact that General Smith, the "United States agent," was also the "engineer in charge" described in specification 43.

Appellant entered upon the performance of the contracts in accordance with their provisions, and in connection with such performance differences arose between appellant and the engineer in charge of the work, with relation to the meaning of the words "measured in place" used in the contracts and specifications, and as to *whether or not the specifications and contracts included and gave the petitioner the right to demand pay for material dredged but derived from the sides or slopes of the excavated channel.* As that dispute is one of the turning points of the case, as we think, we shall speak of it at some length in the argument.

The Chief of the Corps of Engineers, with the approval

of the Secretary of War, instructed William F. Smith, engineer in charge, on his request for instructions to pay only for the material included within the designated line of excavation, and not for such material as should be drawn into the cut as the result of the dredging. Finding V, Rec. 6, 7. Thereupon the engineer notified the appellant, in conformity with the instructions received by him from his superiors, that payment would be made for the quantity of material removed within the designated lines of excavation, and not for material coming in from the sides during the progress of the dredging. See Gen. Smith's letter, Rec. 7, Finding V.

The appellant protested in writing, and on the occasion of receiving each and every installment of money in the way of payment again protested in writing, and asserted that such receipts of payments should be without prejudice to its claims in the matter. The government did not pay appellant the contract price, or any other sum, for the excavation, removal and deposit of any material whatever which came in from the sides during the progress of the work, but refused to pay therefor. Finding V, Rec. 6, 7, 8.

The amount of material that fell or slid from the sides or slopes of the vertical walls in front of the dredge and that was removed along with the other excavated material within the designated lines for dredging, was more than 30,000 cubic yards, which at the contract price of $10\frac{1}{2}$ cents per cubic yard, would amount to over $3,000.00. Finding VI, Rec. 8.

It will be observed that the court did not find the exact amount of material that came in from the sides, but was content with finding that such amount was "more than 30,000 yards" etc.

The record shows that these findings were assailed in a motion for a new trial (Rec. 12), the most material grounds of which are the following:

> 3. The Court erred in not finding the trade meaning of the words "measured in place."
>
> 4. The Court erred in not finding that 260,430 cubic yards fell or slid in from the sides or slopes, which, at the contract price of 10⅞ cents per cubic yard, would amount to $28,321.76.
>
> 5. The Court erred in not rendering judgment in favor of the petitioner for $28,321.76.

With that motion was filed one to amend the findings (Rec. 12, 13), as follows:

> I. Claimant moves the Court to amend finding III by inserting at the end of that finding all that part of request II which is printed on page 181 of the record, and the four lines at the top of page 182, the same being the trade meaning or understanding of the words "measured in place."
>
> II. Claimant moves that finding VI be amended so as to insert 260,430 instead of "30,000," and 28,321.76 instead of "3,000.00."
>
> III. Claimant moves to amend the conclusion of law, so as to give the claimant judgment for $28,321.76.

These motions were overruled by the court, pursuant to the opinion copied on Rec. 13, 14.

Assignments of Error.

1. The court below erred in dismissing the petition.

2. The court below erred in overruling the motion for a new trial.

3. The court below erred in overruling the motion to amend the findings.

4. The court below erred in not entering into the consideration of the expert evidence offered as to the trade meaning of the term "measured in place," and the trade or technical meaning of the specifications.

II.

ARGUMENT.

I.

The engineer in charge should have decided as to the amount of material excavated and removed, without asking for or following the instructions of the Chief of the Corps of Engineers and the Secretary of War, for that power and duty were vested in him alone.

Among the specifications was this:

> 43. The amount of material removed will be paid for by the cubic yard measured in place, and shall be determined by surveys made before dredging is commenced and after it is completed. All surveys and measurements are to be made under the direction of the engineer in charge by persons employed by him for that purpose. The decision of the engineer in charge as to the amount of material excavated and removed, as well as to its location and deposit, shall be final and without appeal on the part of the contractor.

In Finding V (Rec. 6–8), it is stated by the court that differences arose between the appellant and the engineer in charge with reference to the meaning of the words

"measured in place," and whether or not the specifications and contracts *gave the contractor the right to pay for material dredged that came from the sides or slopes of the excavated channel*, and that before commencing the work the appellant addressed a letter to the engineer in charge, General William F. Smith, asking what construction would be placed on the specifications referring to the amount of material to be paid for. And it is then found that General Smith forwarded this request to the Chief of the Corps of Engineers, U. S. Army, asked for instructions, and that officer instructed him, with the approval of the Secretary of War, to pay only for the material included within the designated line of excavation, and not for such material as should be drawn into the cut as a result of the dredging.

Thereupon and pursuant to such instructions, Gen. William F. Smith, the engineer in charge of the work, wrote to the petitioner the following letter:

> UNITED STATES ENGINEER OFFICE,
> 824 Adams Street, Wilmington, Del.,
> *April 23, 1900.*
>
> FRANK C. SOMERS,
> Pres. Bowers Hydraulic Dredging Co.,
> Camden, N. J.
>
> SIR: In reply to your communication of the 17th inst. asking what construction will be placed upon that part of the specifications attached to your contract which refers to the quantity of material to be paid for, you are respectfully informed that payment will be made for the quantity of material removed within the designated lines of excavation as determined by measurments before and after the dredge, and that such measurement does not

include material which comes in from the sides during the progress of dredging.

I deem it proper to add that this is in conformity with the instructions received from the Chief of Engineers on the subject.

Very respectfully,

WM. F. SMITH,
United States Agent.

To this letter the petitioner replied at length in a letter to Gen. Wm. F. Smith, dated May 4th, 1900, which acknowledged the receipt of his letter, and then said:

> We desire to state that such a construction of the contract was not conveyed to us through the specifications for the work, or through any information obtained from your office prior to the submission of our proposal of September 18, 1899, or through any source of information previous to our signing the contract for the work herein referred to. But we would further state your construction of the specifications only came to us through the recent proceedings and action taken by your office in the matter of the claims of the New York Dredging Company upon the same issue as that which has been raised by us.
>
> We further desire at this time to place on record our protest against the construction which has been given by your letter of April 23, 1900, to that part of the specifications referring to the quantity of material which is to be paid for, and to further state that the act of our entering upon and prosecuting the work to be done under our contract shall not be construed as an acceptance on our part of the interpretation of the specifications which is given by your letter herein referred to. Neither shall such acts on our part in any manner operate to the prejudice of such proper claims as we may hereafter make in this connection.

This correspondence was in part about paragraph 43 which specified, among other things, that all surveys and measurements were to be made under the direction of the engineer in charge, and that "the decision of the engineer in charge as to the amount of material excavated and removed, . . . shall be final and without appeal on the part of the contractor." The engineer in charge was to do two things under this paragraph: first, to make surveys and measurements; and second, decide as to the amount of material excavated and removed.

The paragraph begins with the stipulation that the amount of material removed will be paid for by the cubic yard "measured in place", and be determined by surveys made before the dredging is commenced and after its completion. Then follows the stipulation that the surveys and measurements are to be made under the direction of the engineer in charge, and the paragraph concludes with the stipulation that the decision of the engineer in charge as to the amount of material excavated and removed shall be final and without appeal. The nature of this paragraph and others, and the facts brought to the attention of the contractor after the contract had been entered into, made it not only pertinent but important that the contractor should know what interpretation would be placed on that part of the specifications referring to the quantity of the material to be paid for.

General Smith forwarded appellant's letter to the Chief of the Corps of Engineers and "asked for instructions." He received those "instructions," and was informed that they met with the approval of the Secretary of War. Now, as is well known, General Smith had been an officer in the Army of the United States all of his adult life, and it was

but natural, though not according to law, that he, an old-time army officer, should apply to his superior officer for instructions. He did not ask for advice or information, but that he could not have done lawfully, because his superior officer was an officer and representative of the United States, a party to the contract. General Smith looked at the subject from the military standpoint, and asked his superior officer for "instructions" only. They came, and they were obeyed. It was natural, indeed, it was inevitable that General Smith should obey those instructions. An instruction in the military branch of the public service is equivalent to an order or command, and is to be obeyed as such.

But we are not left to conjecture as to the effect on General Smith of those instructions. Finding V shows the *instructions* of the Secretary of War and the Chief of the Corps of Engineers to the engineer in charge that the material coming in from the slopes should not be paid for, etc. "Thereupon and *pursuant to such instructions*," the engineer in charge wrote his letter to appellant, dated April 23, 1900, in which he "respectfully informed" appellant what would be done, and then he said that "this is in *conformity* with the instructions received from the Chief of Engineers on the subject." "Conformity" is a favorite word with military officers, for it places the responsibility on a superior officer, or on a regulation, or on a statute, as the case may be. *The engineer in charge did not decide; he obeyed instructions.*

The findings do not show *decision* by the engineer in charge, but they do show affirmatively and positively that he *obeyed instructions.* He *conformed* with his instructions. To *conform* is to conduct in accordance with; to comply with; to yield to; to obey.—*Webster.*

II.

The language of the contract is plain. The decision of the engineer in charge was required; not the decision of the chief of the corps; not the decision of the Secretary of War; not obedience to instructions.

The surveys and measurements were to be made under the direction of the engineer in charge, and he was to decide as to the amount of material excavated and removed. No other officer or person had anything to do with such questions, matters, decisions, or acts. Spec. 43, p. 72. His judgment was contracted for and his alone.

It was incumbent on the government to keep on the work "an engineer capable, honest and free to exercise a sound, disinterested and impartial judgment."

Mansfield, &c., R. Co. v. *Veeder*, 17 Ohio, 385, 204.

He could not be free to exercise such judgment if he took instructions from his superiors.

In *Baldwin's case*, 15 C. Cls., 297, 303, Judge Richardson said :–

> In approving the Morris contract, the post commander ordered the receiving office to charge the difference in cost to the former contractor, the present claimant. This the receiving officer did without the approval of the department commander.
>
> The contract provided that the receiving officer, who might be supposed to understand all the circumstances better than the post commander, should have the power to charge the contractor for supplies to make up deficiencies, subject to the approval of the highest officer in command, the

department commander. It contemplated the independent judgment of each of those officers. When the receiving officer acted upon the order of the post commander, he surrendered his own judgment and carried out the will of another, in whom the contract had vested no discretion or power in the matter.

A military officer, in obeying the order of a superior, assumes no responsibility for its correctness, and does not adopt it as his own, but becomes merely the instrument by which the power above him is executed. This argument is peculiarly applicable to the case at bar.

In *King's case*, 37 C. Cls., 428, it was stipulated in the contract that the *engineer in charge*, if there was a failure to prosecute the work faithfully and diligently, should have the power, with the sanction of the Chief of Engineers, to "annul this contract by giving notice in writing to that effect to the party . . . of the second part."

On the 10th of April, 1896, the contractor in that case received the following notice:

Dear sir: Your contract for building Flint Creek to Iowa River Levee has been annulled by the Chief of Engineers, which annulment was approved by the Secretary of War. The remainder of the work will be let to other parties.

In the absence of Colonel King,

Very respectfully,

C. W. DURHAM,
Assistant Engineer.

The court fully considered the notice of annulment served on the contractors by the *assistant engineer*, and, on page 437, Chief Justice Nott said:

> On the 10th of April, 1896, the defendants gave notice to the contractor that his contract had "been annulled by the Chief of Engineers, which annulment was approved by the Secretary of War." This notice was signed, in the absence of the engineer in charge, by an assistant engineer who was neither the engineer in charge nor his successor.
>
> As forfeitures are not favored in law, and as parties who seek to assert a forfeiture are generally held to the very letter of their authority, it may be doubted whether in an action between two persons this notice would be upheld by a court. The contract called for "*the judgment of the engineer in charge*," and gave him alone "*power*, with the sanction of the Chief of Engineers, to annul the contract by giving notice in writing to the party of the second part." The Chief of Engineers and the Secretary of War, and the assistant who signed the notice, were not the persons named in the contract. The contractor was entitled to the judgment of the engineer in charge, with the sanction of the Chief of Engineers, and was entitled to "notice in writing *to that effect from the engineer in charge.*"

So in the case at bar the Chief of the Corps of Engineers and the Secretary of War "were not the persons named in the contract.

In the famous case of *Kendall* v. *United States*, 12 Pet., 524, 608, there were controversies about claims for the transportation of the mail. Congress passed an act (6 Stat., 665), by which the solicitor of the Treasury was authorized and directed to settle and adjust the claims, inquire into and determine their equity, and make such allowances therefor as upon full examination of the evidence might seem right according to principles of

equity, and the postmaster-general was directed to credit the claimants with whatever sum or sums of money the solicitor should so decide to be due to them. The solicitor performed the duty and authority created and conferred on him by the law, and made and communicated his decision and award to the postmaster-general. That officer recognized such awards to the amount of $122,102.46, but he refused to recognize awards amounting to $39,462.43. In other words, the postmaster-general took it upon himself to decide as to the force and validity of the awards made by the arbitrator or umpire under the act of Congress. The effect would have been the same in the case at bar, had there been a decision by the engineer in charge, followed by a refusal of the Secretary of War to comply with it, despite the stipulations in specification 34, making such decision final.

In the *Kendall case* the court said, page 611:

> Under this law, the postmaster-general is vested with no discretion or control over the decisions of the solicitor; nor is any appeal or review of that decision provided for by the act. The terms of the submission was a matter resting entirely in the discretion of Congress, and if they thought proper to vest such a power in any one, and especially as the arbitrator was an officer of the government, it did not rest with the postmaster-general to control Congress, or the solicitor, in that affair.

The judgment of this court was that the award of the arbitrator was binding on the parties to it, and that the postmaster-general could be compelled by mandate to execute such award.

In the case at bar we have a contract in which it is expressly provided that the decision of the engineer in charge shall be final, and which then proceeds to deny to the contractor the right of an appeal. That stipulation made it impossible for the contractor to appeal to the Chief of the Corps of Engineers, the Secretary of War, or the President. The contract put the contractor absolutely in the power of the engineer in charge or arbitrator. Evidently it was not thought by the contracting parties, in view of the language used, that the engineer in charge would apply to his superior officer for instructions as to how he should conduct himself as arbitrator. The denial of the right of appeal to the contractor would in itself, in view of the fact that the arbitrator was an officer of the government, deny to the arbitrator the right to ask instructions from his superior officers, even if there were no other rules of justice and law to prohibit such action on his part. To paraphrase the language we have quoted above from the *Kendall case*, it did not rest with the Chief of the Corps of Engineers, or the Secretary of War, to control the engineer in the performance of his duties under the contract.

III.

The power vested in the engineer in charge by the contract was of such a character that he could not delegate it to any one else, neither could it be assumed by any one else, no matter how high his station, nor could it be discharged by a subordinate.

It was the decision of the engineer in charge which was contracted for, not his obedience to the orders of a superior

officer. The parties contracted for the decision, and for the performance of every duty which might be essential to the rendition of the decision, by the officer who had charge of the work—one who could make himself thoroughly familiar with all the conditions and facts. It is easy to see why the decision of an officer of that kind would be preferable to the decisions or orders of an officer at a distance whose time and mind were fully occupied with a thousand official cares.

In *Archer* v. *Williamson*, 2 Harris & Gill (Md.) 62, it was held that arbitrators cannot delegate to another any part of their judicial authority, which is personal to themselves, nor refer to another the decision of a point on which they find a difficulty to decide, and much less to the parties to the submission, or either of them.

In *Wilson* v. *York and Maryland Line R. R. Co.*, 11 Gill & Johnson (Md.), 59, 72, 73, 74, there was a contract for the doing of certain masonry work, in which it was stipulated "The whole to be measured by said agent or the engineer for the time being, whose measurement shall be final and conclusive."

The masonry was not measured by the engineer, but it was measured in his absence by an assistant engineer, and the latter delivered the measurement to the engineer, by whom it was delivered to the defendant.

The plaintiff, who was the contractor, brought action for work and labor done, materials found, etc., and on the trial asked the court to instruct the jury that the measurement made, as above stated, was not binding and conclusive on him, but the trial court modified the instruction so as to state the rule of law to be that the measurement by the assistant, which was delivered by him to the engi-

neer, and by the latter adopted and delivered to the defendant, was valid unless in the making and adopting thereof fraud should be found.

The Court of Appeals held that the modification of the instructions contained error, p. 73, and said :

> But we think there was error in the opinion of the court contained in their modification of the said prayer because, according to the true intent and meaning of the contract of the parties, we think that to Trimble, the chief engineer for the time being, was confided the right and duty of making the measurement of the masonry work, and that by the express terms of the contract power was given to no other person for that purpose. In his skill and integrity, or the person who might succeed him in the responsible position which he occupied, full and implicit confidence might have been reposed, which the plaintiff at least might, for valid reasons, be unwilling to respose in a different and subordinate officer, and the execution of the trust by a different person was *an assumption* of power, not warranted we think by the express terms of the contract.

In *Weeks* v. *Boynton*, 37 Ver., 297, the probate judge was made the arbitrator to ascertain and award in respect to the substituted performance of the condition of defeasance, and that the defendant should have the opportunity to sell the farm, if he should wish to do so. The probate judge, acting as arbitrator, was to decide in respect to the "manner" in which the substituted security should be given, and he was not authorized to delegate any part of his power or discretion to any other person. The arbitrator decided or provided in his award that the bond furnishing such security should be executed and

approved by the cashier of the Bank of Caledonia. The Supreme Court said, p. 301 :–

> It would seem therefore, that the provision in the award, requiring the bond which was executed by the defendant to the plaintiff to be executed and approved by the cashier of the Bank of Caledonia, conferred upon the cashier a trust or discretion which, by the condition of defeasance, was vested in the judge alone, and which was incapable of being shifted or delegated to any other person.

The appointment of the engineer evinced a personal trust of such a nature as to deny to him the right to entrust to another person the decision of the matters covered by the contract and specifications. That rule of law is well established. See the cases above cited, and—

Eastern Co. R. Co., v. *Eastern Union R. Co.*, *68, Eng. Ch., 463 ;*
Lingnood v. *Eade*, 2 Atk. 501 ;
Proctor v. *Williams*, 8 C. B. (N. S.) 386 ;
Whitmore v. *Smith*, 5 H. & N. 824 ;
Little v. *Newton*, 2 Scott N. R. 509.

The personal trust was in the engineer and no other.

IV.

The engineer in charge had the right to ask information from disinterested persons, but not from his superior officers, for they were not disinterested.

In the opinion of the court below (Rec. 10), it is said that the engineer in charge was not "inhibited from seeking

information from his superior officer, upon which to base his decision, provided only after he obtained such information the decision rendered was his own."

To this we answer: First, the engineer did not ask for information, but for instructions; second, the engineer had no right to ask instructions from his superior officer; third, the engineer was a skilled professional man and not a layman dealing with a technical subject; fourth, after receiving such instructions the engineer conformed therewith, as we have heretofore shown.

Evidently the court below misinterpreted or misapplied the rule of law which allows arbitrators, in a case requiring it, to obtain from disinterested persons of acknowledged skill such information and advice in reference to technical questions submitted to them as may be necessary to enable them to come to correct conclusions, provided the award is the result of their own judgment after obtaing such information.

Soulsby v. *Hodson*, 3 Burr. 1474;
Caledonia Ry. Co. v. *Lockhart*, 3 Macq. 808;
Anderson v. *Wallace*, 3 Cl. & Fin. 26;
Eads v. *Williams*, 3 DeG., M. & G. 674;
Hopcraft v. *Hickman*, 3 L. J. Ch. 43.

By comparing the language of the court below with the rule of law established by the authorities, it will be seen that the court was clearly mistaken as to the right of the engineer to apply to his superior officers either for information or instruction. He was the official representative of the Chief of the Corps of Engineers and the Secretary of War, as well as their subordinate. They were not disinterested parties or parties outside the

contract, for they were representing one of the parties to the contract—the United States—while the engineer was a skilled professional man, presumed to have all the technical knowledge needed, and charged with the duty to protect all parties to the contract. They were also performing official duties with reference to the contract, and like the engineer in charge though in less degree, they were coming in contact with the contractor, but in opposition. Aside from all this, however, stands the indisputable fact that an army officer calls upon another army officer, who secures the approval of his superior, the Secretary of War, to the instructions given and obeyed.

V.

If the engineer officer proceeded upon a wrong or mistaken interpretation of the contract, the court will give relief, notwithstanding the provision that his decision shall be final.

This is a well settled rule of law.

Robertson v. *Frank Brothers Co.*, 132 U. S. 17 ;
Lewis v. *Chicago, etc., R. R.*, 49 Fed. 708 ;
Alton R. R. Co. v. *Northcott*, 15 Ills. 49 ;
Starkey v. *DeGroff*, 22 Minn. 431 ;
M. & G. R. R. Co. v. *Veeder & Co.*, 17 Ohio 385 ;
McAvoy v. *Long*, 13 Ills. 147 ;
Williams v. *Chicago, etc. Ry. Co.*, 112 Mo. 463, 493–495 ;
Herrick v. *Ver. Cent. R. Co.*, 27 Ver. 673 ;
Kidwell v. *B. & O. R. R. Co.*, 11 Grat. 376 ;
Kistler v. *I. & St. L. R. Co.*, 88 Ind. 460 ;
Beckwith Case, 38 C. Cls. 295, 314.

In performing the functions conferred by such stipulations, the engineer must have strict regard to the terms of the contract. His duties are to be ascertained from it, and his powers are limited to what it confers, or may be clearly implied from its terms. He cannot go beyond it nor behind it. His powers are not to be enlarged by implication beyond the plain words used.

> *Launman* v. *Younge*, 13 Pa. St. 306 ;
> *Williams* v. *Chicago Ry. Co.*, 112 Mo. 466 ;
> *Sawtelle* v. *Howard* (Mich.), 62 N. W. Rep. 156.

In the case at bar, the engineer went beyond the contract and asked his superior officers to instruct him how to decide, although the sole power of decision was vested in him by the terms of the contract and specifications prepared and furnished by the United States and which are to be taken most strictly against the government, liberality of construction being in favor of the contractor.

> *Edgar Thompson Works Case*, 34 C. Cls. 205, 219 ;
> *Chambers Case*, 24 C. Cls. 387.

The subject-matter of the controversy must be clearly within the contract or specifications to take away the rights of the court or jury, and the engineer's determination will be conclusive only when clearly within the powers conferred upon him.

> *Sanders* v. *Hutchinson*, 26 Ill. 633 ;
> *Mills* v. *Weeks*, 21 Ill. 596 ;
> *Launman* v. *Younge*, 13 Pa. St. 306.

The engineer has no power to bind the parties when he goes beyond the terms of the contract or misinterprets it.

Starkey v. *De Groff*, 22 Minn. 431 ;
Alton R. R. Co. v. *Northcott*, 15 Ill. 49 ;
Grant v. *Savannah R. Co.*, 51 Ga. 348 ;
Kistler v. *I. & St. L. R. Co.*, 88 Ind. 460.

The engineer's decision or estimate is a conclusive adjudication only upon the condition that it is made according to the contract.

Drehew v. *Altoona*, 121 Pa. St. 401 ;
Williams v. *Chicago, &c., Ry. Co.*, 112 Mo. 463, 472, 473, 493–495.

In this connection the *Beckwith case*, 38 C. Cls. 295, 299, 314, is particularly instructive. The contract (p. 305), required the contractor to construct a tunnel of a certain length, width and height, for a price named, through the earth and rock for about four miles. The contract made final the decision of the engineer officer in charge as to quality and quantity of the work. Findings XVI and XVII (p. 299), set forth the facts showing that the engineer did not measure the work as it should have been measured under the contract, and to the loss of the contractor in about $40,000.00.

On page 314 the court considers the law as applicable to the findings we have named, and also considers the stipulation that the decision of the engineer should be final, and it holds that the engineer should have made certain allowances and measurements, and because he failed to do so the claimant was entitled to judgment for

the difference between the quantity measured and allowed by the engineer and that which the court held he should have measured and allowed under the contract.

The total judgment in the Beckwith case was $130,736.18. The case was not appealed and the judgment was paid.

The rule that, if the officer proceed upon a wrong interpretation of the contract, the contractor is not bound thereby, finds its parallel in principle and justice in the general rule that the valuation of merchandise made by a customs appraiser is conclusive if no appeal be taken therefrom, *subject to the qualification that if the appraiser proceed upon a wrong principle, or contrary to law, and this be made to appear, his appraisement may be impeached.*

Robertson v. *Frank Bros. Co.*, 132 U. S. 17.

What is done unlawfully is as if it had not been done at all.

VI.

The engineer should have determined the amount of the material excavated and removed by means of surveys made before and after dredging and by calculations based thereon.

We now ask more particular attention to the language of the specification 43:

> The amount of material removed will be paid for by the cubic yard measured in place, and shall be determined by surveys made before dredging is commenced and after it is completed. All surveys and measurements are to be made under the direction of the engineer in charge by persons employed by him for that purpose. The decision of

> the engineer in charge as to the amount of material excavated and removed, as well as to its location and deposit, shall be final and without appeal on the part of the contractor.

It will be observed that the amount of material removed shall be determined by surveys before dredging is commenced and after it is completed, and that all surveys and measurements are to be made under the direction of the engineer in charge, whose decision "as to the amount of the material excavated and removed, . . . shall be final and without appeal on the part of the contractor." The only question of concern left to the decision of the engineer in charge by this specification was "as to the amount of material excavated and removed", and he was to get the knowledge on which to base that decision from surveys and measurements made under his direction, "before dredging is commenced and after it is completed," not from instructions given by his superiors in office. Therefore, it was the duty of the engineer in charge to have the surveys so made as to embrace and show the facts, conditions, excavations and removals, to the end that thereby he might be able to decide "as to the amount of material excavated and removed."

But the engineer saw fit to disregard the protests of the contractor and follow the directions of his superior officers, and so he refused to make surveys and measurements in such a way as to allow for "the amount of material excavated and removed," including the amount thereof which came into the cut or channel from the sides or slopes.

In *Scoville* v. *Miller*, 40 Ill. App. 237, the quantities were to be determined by the engineer, and the court

held that when the whole cut or embankment had been measured he could determine, by reference to the known contents and *data* collected, the quantity of materials excavated. It will be observed that the whole cut or embankment had to be measured. In the case at bar we are insisting that the whole cut had to be measured in order that the quantity of materials excavated and removed should be determined.

A dredging operation is the reverse of making an embankment on dry land; it is, in its essential features as to measurement, like making a cut or tunnel in earth or rock. To ascertain the amount of material taken from a cut or tunnel made in earth or rock, measurements and surveys of the entire cut or tunnel would have to be made. That would be measurement in place. To ascertain the amount of material used in making an embankment a measurement of the entire embankment would have to be made.

Collins and Farwell Case, 34 C. Cls. 307, 320.

That would be like measurement in place in such a case as this.

It would be impossible to get the quantities of material removed in making a cut or an embankment by treating the cut or the embankment as if it were a prism of a certain length, width, depth, having perpendicular sides, and yet that is exactly what the engineer undertook to do in the case at bar.

It is well settled that when, as in the case at bar, the contract provides that the engineer shall determine the amount of work, it does not give him the exclusive de-

termination of *the manner in which it shall be done according to contract.* *It does not give him the interpretation of the contract.*

G. H. & S. A. Ry. Co. v. *Henry*, 65 Tex. 685;
G. H. & S. A. Ry. Co. v. *Johnson*, 74 Tex. 256;
Williams v. *Chicago Ry. Co.* (Mo.), 20 S. W. Rep. 631.

The contractor may show that the engineer misconstrued the contract in his classifications of the work, and did not measure the work according to the contract, *and he may show these things by evidence without alleging fraud.*

Collins and Farwell Case, 34 C. Cls. 294, 332;
Beckwith Case, 38 C. Cls. 294, 299;
Williams v. *Chicago Ry. Co.*, 112 Mo. 463;
Lewis vs. Chicago Ry. Co., 49 Fed. Rep. 708;
Summers v. *Chicago Ry. Co.*, 49 Fed. Rep. 714.

In *Bridge Co.* v. *City of St. Louis*, 43 Fed. Rep. 768, and *Lewis* v. *C. S. F. Ry. Co.*, 49 Fed. Rep. 708, 710, it was held that when the "engineer in charge puts a wrong construction on any provision of the contract, the court will correct any substantial errors resulting from such mistake, for the reason that the parties did not make the decision of the engineer as to the interpretation of the contract final and conclusive. It is the province of the court to construe the agreement."

Those cases were approved and followed in *Williams* v. *C. S. F. Ry. Co.*, 112 Mo. 463, 493, in an elaborate and learned opinion by Gantt, J.

So, in the case at bar, the engineer in charge and his superior officers saw fit to decide the principles of law ap-

plicable to this case. It was not for him or them to decide the principle of law on which the measurement should be made, for it is the province of the court to determine the law of the contract. The provision in the contract that his decision as to the *amount* of material excavated and removed should be final "refers only to his measurement in point of fact and not to the principle of law on which it is made."

Lyon v. *United States*, 30 C. Cls. 352, 365.

In that case when the contract was entered into there existed the general custom set forth in the findings, and there being nothing in the contract expressly excluding such custom, the court treated it as incorporated therein and then held that, in view of the custom, the action of the engineer officer in charge in refusing to make allowances for shrinkage was erroneous, and that the contractor should have been paid for so many yards of filling actually furished, and that the provision concerning the final decision of the engineer referred only *to his measurement in point of fact and not to the principle of law on which it is made.*

In the *Collins and Farwell Case*, 34 C. Cls. 294, 332, the engineer proceeded upon a wrong interpretation of the contract, excluded from his calculations and in the measurement a factor to which the contractors were entitled to the benefit of, and the court granted relief "notwithstanding the provision that the decision of the engineer shall be final."

The appellant here was obliged to remove the earth that fell into the cut from the sides or slopes. The nature of the case required it. The officers and agents of the

United States required it. The government got the benefit of that necessary work and should pay for it.

By the terms of the contract in the *Collins and Farwell case* above cited, there was to be 108,000 cubic yards of rock excavation of a length, depth, and width to be fixed by the engineer in charge. He called for an excavation below grade in excess of the amount fixed ; the contractor complied with the requirements of the engineer, and the court held that he was entitled to compensation for work done below grade. Among other things, the court said :

> The provision which authorized the engineer to determine the width, length, and depth of the pit to put in the foundations and walls of the proposed lock is in the specifications, but this was not meant to compel the contractors to excavate within slopes and above grade at the price fixed by the contract and excavate without price at all below grade as far as the engineer saw fit to order them to go.

In the case at bar, the requirements of the engineer and of the situation could only be met by excavating or removing from the cut or channel the material which fell in from the sides and slopes. The work was done necessarily beyond the sides of the prism, but in the Collins and Farwell case the work was done below the grade line of the excavation. That is the only difference between the cases.

The case of *Beckwith and Quackenbush*, 38 C. Cls. 295, 299, 314, is squarely in point here. The contract was for the construction of a tunnel which was to be lined with brick. It was necessary that the rock excavation

be slightly larger than the outer perimeter of the brick lining, and the contractor for the tunnel made the excavation slightly larger on that account. The measurement made by the engineer officer stopped at the outer perimeter of the brick work.

He allowed only 12¾ inches for the thickness of the arch instead of 13⅛ inches as actually constructed. In order to put in that thickness of brick masonry, the claimant had to make additional excavations. All this was allowed by the court, though not in the engineer's estimates and measurements.

It will be seen that the contract there provided that "the decision of the engineer officer in charge as to the quality and quantity shall be final." Top of page 314. Notwithstanding this provision, the court held that the quantities indicated in the findings should have been estimated, measured, and paid for by the engineer, and it rendered judgment accordingly.

In *Seymour* v. *Long Dock Co*, 20 N. J. Eq. 396, labor was necessary to removed rock outside the lines and limits of a tunnel, and to remove materials that had fallen from the roof of the tunnel, and the court held that the contractor was entitled to compensation therefor. He was obliged by his contract to follow the lines, levels, and directions of the engineer, and the court adoped the rule that where such work was necessary to the prosecution of the undertaking, it should be allowed and paid for.

The court held, also, that the duties of the engineer were ministerial, not judicial, and hence his acts and decisions could be reviewed and overturned.

In *Pucci* v. *Barney*, 21 N. Y. Supp. 1099, 1101, Bookstaver, J., said—

> Everyone knows that in excavating soil it cannot be done to the exact line, and nothing more, but that slopes must be allowed for, or there would be danger of the superincumbent earth falling upon and injuring those doing the work in the excavation.

In *Clark* v. *United States*, 6 Wall. 543, the contractor agreed to build the embankment for a certain sum per cubic yard, and the Supreme Court held he was entitled to such measurement as would include a natural settling of the foundation while the embankment was building, as well as for waste and shrinkage of the embankment. The court held that any system of measurement which did not make such allowances was incorrect, and the contractor was given a judgment for the amount which had been withheld from him on that account, viz: $8,690. See 4 C. Cls. 148, 155, for the report of that case in the Court of Claims.

In the case at bar, first sentence of specification 43 is—

> The amount of material removed will be paid for by the cubic yard measured in place, and shall be determined by surveys made before dredging is commenced and after it is completed.

In the case of the *San Francisco Bridge Co.*, 40 C. Cls. 139, the first sentence of specification 8 was—

> All material shall be measured in place, the amount excavated being determined by careful surveys made before and after the dredging.

It will be observed that the two sentences above copied are substantially alike. Their purport is the same. In

the case last named silt was deposited in the channel after the dredging operations had been completed, and the government made deduction on that account. In considering the language above quoted from the specification in that case, the Court of Claims said, page 165:

> The plain significance of section 8 of the specifications is that the material shall be measured in place, the amount excavated to be determined immediately before and after dredging. This was done and payments made according to such measurements less a reservation of 10 per cent., the final payment, according to section 22, to be made only after thorough inspection and soundings.

The court gave the claimant judgment for the amount that had been deducted, $15,744.17.

In that case specification 2 (see bottom of page 140) stated that the material to be dredged consisted of the original hardpan in place, and the deposit of clay, mud, silt, and other material, and in specification 41, Rec. 4, of the case at bar, it is stated that the nature of the bottom is sand, mud, clay, and gravel. In both specifications statements were made, therefore, that showed conclusively that the earth through which the channels were to be dredged consisted of material that would inevitably come into the excavation from the sides as the work progressed. An examination of the record in the San Francisco Bridge Co. case in the Court of Claims, above cited, will show that the government officers so interpreted the contract in that case as to authorize them to pay for the material that came into the cut or excavation from the sides, and that they made such

payments. That action of the officers evidently met with the approval of the Court of Claims. No other interpretation can be put upon the fact that nothing the officers did was criticised by the court, with the solitary exception of making the deduction on account of the silt that came into the cut after the dredging. There, as in the case at bar, the contractor agreed to excavate a specified number of cubic yards, at a specified price per cubic yard, and the material was to be paid for "measured in place," at the specified price.

Of course, such material excavated in water by the use of hydraulic dredges could not be measured at the instant it was pumped up from its resting place, and the contract precludes any such idea as that. The contract is that it shall be "measured in place." If those words have any meaning to the lay mind, it would seem to be that the measurement would be of the place excavated, and would comprise all of the space so excavated, there being no language to the contrary in the contract or specifications. In other words, by determining through surveys and measurements what the condition was before the dredging and what it was after the dredging, the difference would be the amount of cubic yards excavated as determined by calculation.

These specifications direct or state the manner in which the dredged material is to be paid for, no matter how it may be dredged. "The amount of the material removed will be paid for by the cubic yard measured in place," says specification 43. "Payments will be allowed for actual dredging, &c.," says specification 44. "Work done outside of the designated lines of excavation or be-

low the specified depth will not be paid for," says specification 44. "The location of the work shall be plainly located by stakes and ranges," says specification 45. The work being thus located, the contractor was required to do no work outside of the designated lines of excavation or below the specified depth, and the contractor agreed that if it did the work outside those lines or below the specified depth, it would not be paid.

It must not be forgotten that this was a contract for hydraulic dredging, and that the dredged material was to be "properly and securely placed above high water, behind banks along the line of the Christiana River." Finding III. That could be done properly by pumping it ashore. The whole job was of the suction and pumping order, both in excavating or dredging and in putting the material ashore. The material dredged was specially and peculiarly adopted to that form of operation.

We must consider the character of the material in which the dredging was to be done. We must keep in mind the natural law which compels sand, mud and gravel lying in water to seek the lowest level in case of disturbance. It was inevitable, therefore, that when working within the "location of the work," as defined by stakes and ranges, the sand, mud, clay and gravel would fall into the cut, and the contractor had to remove such material from the bottom of the cut in order that it should be of the required depth.

Courts will take judicial notice of natural laws, the well-known qualities and properties of matter, and that which will happen according to the invariable course of nature.

1 Elliott on Ev., sec. 69, 70.

VII.

How would those skilled in the dredging trade understand and interpret the contract and specifications?

We think those skilled in the dredging trade and its terminology would reason substantially as follows:

The language of the specifications indicates the manner in which the material is to be paid for, irrespective of the way in which it is to be dredged, and under the language of those specifications, unless there were other limitations placed on it, the contractor would be entitled to all the material which it would dredge, as measured in the excavation, to be determined by surveys made before the work was done to determine the original surface, and by a survey after the work was done to determine the surface made by the dredge, and the material coming into the cut or excavation from the slopes would have to be paid for.

The material to be removed, and prior to its removal, may be considered as lying between an approximately horizontal plane, which is the natural and original surface of the material, and the horizontal plane at the bottom of the material, which is the limit of the excavation, and between the side or sloping planes which mark the natural slope of the material to be removed, for it would be impossible to remove such material as is described in the specifications without establishing thereby a natural slope.

The words "work done outside of the designated lines of excavation, or below the specified depth, will not be paid for," must mean material outside of the planes above described.

If the dredger should make 22 feet of water there, or go one foot below the 21-foot point mentioned in the specifications, that extra foot he would lose, and if he should make that channel 210 feet wide on the bottom, instead of 200 feet, as required by the specifications, thus going below the bottom line and beyond the side line, he would not get pay for that work below or beyond. But as long as he kept within the designated lines of 200 feet in width and 21 feet below mean low water level, he would be entitled to pay for what came in from the natural slopes of the material excavated. That material coming into the region of the planes above described is "in place" and must be measured as such. If the dredge makes a cut 200 feet wide at the bottom and of the required depth, the dredger is entitled to pay for whatever came in from the natural slopes of the material to be dredged, because he worked within "the location of the work" and he did not do any work "outside of the designated line of excavation or below the specified depth." Whatever he did within the designated lines of excavation and above the specified depth resulted in "material removed," and therefore it is to be "paid for by the cubic yard measured in place", and that is to be "determined by surveys made before dredging is commenced and after it is completed."

It is for the purpose of determining whether or not the excavation is of the required depth and for determining the amount of material removed that a survey was to be made of the natural ground surface before the work was done and of the new surface after the work had been done.

The material shown by those surveys to have been removed is to be paid for by the cubic yard measured in place.

Suppose a contract for the excavation of a channel of a certain width and depth through wet or loose earth, the "material removed" to be "paid for by the cubic yard measured in place" and be "determined by surveys made before" the work "is commenced and after it is completed," the "location of the work" to be "plainly located by stakes and ranges." The first thing to do is to make a survey of the ground and a due location of the work. After the work is done the next thing to do is to determine by surveys whether or not the work has been cut of the required with and depth, and the next thing is to make such survey, measurement and calculation as will show the exact dimensions of the cut as it appears in the earth. Whatever may have come into the excavation from the natural slopes or sides of the cut would have to be paid for, otherwise there would not be payment "of material removed." It would be "measured in place" because it came into the cut naturally and unavoidably, and would have to be paid for in order that the contractor should be paid for "material removed." This would be true, although the contract may have specified that work done outside of the designated lines of excavation or below the specified depth would not be paid for. Such language as that would mean that the contractor must not make work or pay for himself, but must confine his operations within the location of the work as designated, and it could have no other restrictive force.

That reasoning gives effect to every part of the contract and specifications, and does not read into them by interpretation language not written there by the contracting parties.

VIII.

The government did not put language in the contract and specifications stating that material coming in from the sides should not be paid for.

The government put this contractor to work in that soft material and agreed to pay him for the "material removed," the amount of which should be determined by surveys made before dredging and after, stipulating that the location of the work should be plainly designated by stakes and ranges. If the government had intended that the material coming in from the sides or slopes of the excavation should not be paid for, it would have been perfectly easy to have used language in its contract and specifications that would have put the question beyond the region of debate. For instance, it could have said that "material coming in from the sides or slopes should not be paid for." The government did nothing of the sort, nor did it use language to that effect. The contractor, therefore, had the right to understand that the amount of the "material removed" would be paid for by the cubic yard "measured in place," the amount to be determined by surveys made before dredging and after. The dredging had to be done within the designated lines of 200 feet in width and 21 feet in depth below mean low water level, and dredging in that material could not be done without removing from the excavated channel everything that came into it from the sides and which, if not removed, would have prevented the dredger from reaching the 21-foot level.

There seems to be no reason why there should not be applied to the contract and the specifications here the

principle so often applied to statutes by this court, that if Congress had desired to grant a given power, right or authority, "it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power."

Tillson v. *United States*, 100 U. S. 46;
Vicks, etc., R. Co., v. *Dennis*, 116 U. S. 669;
United States v. *Chase*, 135 U. S. 259.

The principles of interpretation are very similar, whether applied to contracts, to deeds, or to statutes.

2 Pars. Cont. side p. 494.

We see no reason why that fundamental principle is not equally applicable to the contract in the case at bar.

IX.

The Court of Claims should have considered and given due weight to the evidence about the trade meaning of the words "measured in place."

This question of law was saved by the motion for a new trial and the motion to amend the findings. Rec. 12, 13, and the opinion on those motions, pages 13, 14.

The matter that the appellant moved the court to add to Finding III is as follows:

> The words "measured in place" are a definition of the method or manner in which the volume of material paid for is to be measured, and in no wise a definition or description of any method of doing the work. The term means in the dredging

trade that the material removed is to be determined by such methods as will determine its volume upon the bottom of the waterway prior to its removal, and which can only be determined by proper surveys made before the material is removed, followed by surveys made after the material is removed. The first of these surveys determines the unusual conditions of the top surface of the material prior to its removal, the second survey determines the top surface of the cross section of the material after its removal, and the difference in cross section between these two surveys is the method by which the volume of material in place is measured. The material to be removed, and prior to its removal, may be considered as lying between an approximately horizontal plane, which is the natural and original surface of the material, and a horizontal plane at the bottom of material, which is the limit of the excavation, and between side or sloping planes which mark the natural slope of the material to be removed.

When the contract for dredging states that payment was to be made at a certain price per cubic yard "measured in place," it is understood thereby in the dredging trade that all the material excavated, including the sides or slopes, or that which comes in from the sides or slopes, shall be paid for at the stipulated price, unless there be other language to the contrary in the contract. The claimant so understood the words "measured in place" when making the bid and the contract.

The foregoing is taken from the record in the court below. That court "did not enter into the consideration of the expert evidence offered for or against the custom or trade meaning of the term 'measured in place,'" and the trade or technical meaning of the specifications, for the reason that the court thought it inadmissible. Rec. 13, 14.

Assuming for the present purpose that such evidence was admissible, has the question been so saved by the record that this court can pass upon it?

We answer the question in the affirmative and for the following reasons:—

The rules of this court relating to appeals from the Court of Claims, so far as we think them applicable to this case, are—

> I. In all cases hereafter decided in the Court of Claims, in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:
>
> 1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.
>
> 2. A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as part of the record.
>
> IV. In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of fact and their conclusions of law therein, in open court, before or at the time they enter judgment in the case.

> V. In every such case, each party, at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact.

Appellant complied with those rules, but the court below did not incorporate in its finding the facts established by the evidence on the trade meaning of the words "measured in place," or even state in the findings that evidence had been offered on the subject, as was done in *Moore's case*, 11 C. Cls. 94; affirmed in *same case*, 91 U. S. 270; *in Clark's case*, 11 C. Cls. 698, and 96 U. S. 37; in the *Gregory and Bishop case*, 33 C. Cls. 434, 436, Finding V; and in the *J. J. Moore & Co. case*, 38 C. Cls. 590, and 196 U. S. 157, Finding III, although in the last case it was held that the facts so found could not affect the contract.

That omission here drove the appellant to move for a new trial and an amendment of the findings for that reason, among others. Those motions are "pleadings in the case," and the action of the court in overruling them is an interlocutory order or ruling within paragraph 1, rule 1, above quoted, and "necessary to a proper review of the case" here.

Thus we bring before this court for review the ruling and decision of the court below on the admissibility of the evidence which it refused to consider.

In Union Pacific Ry. Co., v. *United States*, 116 U. S. 154, 157, Mr. Chief Justice Waite said:

> Under our rule the facts are to be settled by the Court of Claims, and an appeal brings up for

> review only the decisions of that court upon questions of law arising in the course of the trial or in the application of the law to the facts as finally found.

Here the question of law on the admissibility of the evidence arose "in the course of the trial," and it is brought into the record under rule 1 by the motions and the opinions thereon.

The court below might have presented the question more formally, as was done in *Moore's Case*, 11 C. Cls. 94, and 91 U. S. 270, when the Court of Claims said in its finding that the certificate was proved in court by a comparison then made of the handwriting and signature of the certificate with the handwriting and signature of the petitioner in another writing in evidence for other purposes in the case, and the certificate was copied in the finding. Thereupon judgment was rendered dismissing the petition, on the theory that the facts set forth in the certificate so admitted in evidence entitled the government to that judgment. This court held that it was proper for the court below to make that comparison and admit the certificate in evidence after it had been established by such comparison, and the judgment of the court below was affirmed.

It will be noted that the question of the admissibility of the evidence in that case was formally preserved by the finding of fact.

The ruling in the case at bar did not take that form, but that cannot deprive this court of its right to make "a proper review of the case" on appeal and "pass upon questions of law arising in the course of the trial." To hold otherwise would be to allow the Court of Claims to

reject as inadmissible evidence of vast and controlling importance, omit it from the formal findings, and thus render nugatory the right of appeal given by the statute and regulated by the rules of the Supreme Court. This court will not fail to consider the admissibility of evidence when the question arises in such manner as to show what was considered by the Court of Claims.

In *United States* v. *Clark*, 96 U. S. 37, 39, 40, the Court of Claims incorporated in its fifth finding the record of a court martial trial and based its finding on the facts established thereby. This court held that record inadmissible and reversed the judgment of the Court of Claims. That record, under the rules of this court, had no proper place in the findings, but it was considered here for the purpose of deciding whether or not it was admissible in evidence. So, in the case at bar, the question of the admissibility of evidence as to the trade meaning of the words "measured in place," and certain specifications was raised by the motions and decided adversely to appellant in the opinion, Rec. 13, 14, and the order at the end of the opinion. We submit, that those motions and the opinion and order are parts of the transcript, because made so by Rule 1.

But the existence of section 7 of the Tucker Act should not be forgotten in this connection. The Tucker Act (24 Stat., 505) is an act "to provide for the bringing of suits against the government of the United States." That act confers jurisdiction on the Court of Claims and concurrent jurisdiction on the district and circuit courts in certain cases. The act defines the jurisdiction of the courts and prescribes the procedure in certain respects. In section 7 it is enacted that:

> It shall be the duty of the court to cause a written opinion to be filed in the cause, setting

> forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon.

The opinions of the court are a part of the record and may be examined "in order to ascertain the questions presented."

Egan v. *Hart*, 165 U. S., bottom of p. 189.

The opinions filed in the case at bar show two things:

1. Specific findings of the facts by reference to the findings of fact formally made, as well as by statements of facts in the opinions themselves as to evidence not considered.

2. Conclusions of the court upon the questions of law involved in the case as understood by the court. One of the questions of law thus set forth and decided adversely to the appellant was on the admissibility of the evidence as to the trade meaning of the words "measured in place" and certain specifications.

We think this statute and the rules of this court, as well as the other statutes of the United States on the subject of appeals from the Court of Claims, are to be construed together, and that this particular statute authorizes this court to look into the opinions below for the purpose of learning what that court ruled on questions of law involved in the case.

We submit that the question of the admissibility of the evidence which the court below refused to consider is preserved by the record here.

X.

The Court of Claims should have found the technical or trade meaning of the words "measured in place" in connection with the other language of the specifications; and evidence as to the meaning of those words and specifications was admissible and should have been considered by the court.

In 2 Pars. on Cont., side p. 499, the learned author says:

> The subject-matter of the contract is to be fully considered. There are very many words and phrases which have one meaning in ordinary narration or composition, and quite another when they are used as technical words in relation to some special subject; and it is obvious that, if this be the subject-matter of the contract, it must be supposed that the words are used in this specific and technical sense.

The contract here is on a technical subject, and it was made through, by and between parties who were thoroughly familiar with the technical terms of the dredging trade. The United States was represented by its engineer officers. The contractor was a corporation engaged in the dredging business for a long time, and it was represented by officers who understood the trade and its terminology.

It is well settled that if a contract refers to principles of science or art, or uses the technical phraseology of some occupation, or common words in a technical sense, their exact meaning may be shown by the testimony of experts, persons possessing the peculiar knowledge and skill

requisite for the interpretation of the contract.

2 Parsons on Cont., 7th ed., side pp. 555, 556;
1 Greenleaf on Ev., 14th ed., sec. 280;
1 Elliott on Ev., sec. 605;
4 Wigmore on Ev., sec. 2458-2467;
1 Starkie on Ev., side pp. 653, 701;
Jones on the Const. of Com.,
and Trade Contracts, sec. 62, 204.

The rule was clearly stated by Mr. Justice Campbell in *Garrison* v. *Memphis Ins. Co.*, 19 How. 312, 313, as follows:

> In mercantile contracts, evidence is admissible to prove that the words in which the particular contract is expressed, in the particular trade to which the contract refers, are used in a peculiar sense, and different from that which they ordinarily import, and to annex incidents to written contracts, in respect to which they are silent, but which both parties probably contemplated, because usual in such contracts.

And to the same effect are:

Salmon Falls Mfg. Co. v. *Goddard*, 14 How. 446, 454;
Moran v. *Prather*, 23 Wall. 492, 499.

One of the best text book statements of the rule and massing of its illustrations is to be found in 17 Cyc. 685-687, where it is said—

> Where a written instrument contains words or expressions which are of a technical nature, being connected with some art, science or occupation, and

unintelligible to the common reader, yet susceptible of a definite interpretation by experts, parol evidence is admitted for the purpose of explaining the language used, and thus effectuating the intention of the parties through the medium of their own language. Evidence has been admitted in the application of this principle to show the meaning of "actual stone measured in the wall," "cabinet and mahogany door making," "cold storage," "colliery," "crop of flax," "dangers of the river," "excavated and repaired," "feed privileges," "four dollars an order," "good, hard brick," "hewn timber to average one hundred and twenty feet, and class B No. 1 good," "mason work," "mercantile measurement," "noiseless steam motors," "on margin," "privilege," "quantity guaranteed," "sea letter," "season," "spitting of blood," "subject to strikes," "tontine policy," and "tontine installment policy," "transportation," "switching" and "transfer," "traveling expenses," "zinc," and the like. It is not necessary in order that this rule may apply that the word or phrase should have no fixed meaning in ordinary usage, for even though it has such a meaning, yet if it also has a technical meaning in the language of commerce or art, parol evidence is admissible to show that it was used in the latter sense, and, if the court is satisfied that it was so used, extrinsic evidence is admissible to explain what the technical meaning is.

The rule has been recognized many times in this court. One of the best considered cases is *Loom Co.* v. *Higgins*, 105 U. S. 580, 586, and we make the following quotation from the opinion of the court, which was written by Mr. Justice Bradley :

Applying these remarks to the specification be-

fore us, and recurring to the extract already made, setting forth the nature and object of the invention, it is easy to conceive that its meaning may be plain to those for whose use it is intended. They know at once what is meant by the terms, "reciprocating or driving slide," "sliding-bar," "withdrawing and inserting devices," "trough," "wire," "wire-box," "lay," &c. They also understand the movements referred to, and the objects to be attained by each device.

In like manner, if we follow the specification in its description of the invention in detail, with the references to the drawings, and the closing summary of the patentee's claims, the same method of interpretation will be applicable. And as it cannot be expected that the court will possess the requisite knowledge for this purpose, it becomes necessary that it should avail itself of the light furnished by the evidence to enable it to understand the terms used in the patent and the devices and operations described or alluded to therein. This evidence, of which the record in this case furnishes an abundance, being resorted to, we have no difficulty in comprehending the patent, or the nature of the invention therein described.

The terms quoted above are no more technical or difficult in their language than are those in the contract and specifications in the case at bar, but the court did not hesitate to avail itself of the light furnished by the evidence to enable it to understand the terms as used in the petition.

This court has decided many times that in the interpretation of statutes imposing duties on imports, if words used therein to designate particular kinds or classes of goods have a well-known signification in trade and com-

merce, different from their ordinary meaning among the people, the commercial meaning is to prevail, unless Congress has clearly manifested a contrary intention, *and that it is only when no commercial meaning is called for or proved that the common meaning of the words is to be adopted.*

Cadwalader v. *Zeh*, 151 U. S. 171, 176, and cases cited.

The principle of interpretation is the same whether applied to a statute or to a contract.

In the case at bar the court ignored its own ruling in the *Gregory and Bishop case*, 33 C. Cls. 434, 436, where the court found that the terms "solid rock" and "surface water" used in the contract had a technical meaning in the trade of boring artesian wells, and that the words "solid rock" in that trade meant the rock which is found below the loam, gravel, etc.; that is, rock which will neither cave in when drilled nor move under the drill. See findings V to X, inclusive. Having found the technical meaning of those terms, the court gave judgment for the claimants in the sum of $2,121.72. The court could not have found the technical meaning of those terms without considering evidence introduced to show their technical meaning.

Illustrations of the rule may be found useful.

The term "mason work," as used in the contract to construct water works for a city, may or may not include the laying of inlet, suction and drain pipes, and hence evidence is admissible to show the meaning of such words.

Elgin v. *Joslyn*, 136 Ill. 525.

The phrase "actual stone measured in the wall," has been held to have no necessary legal signification, and that, therefore, parol evidence of its trade meaning was admissible.

Brenneman v. *Bush*, 30 S. W. Rep. 699.

In a contract for masonry at a specified price per foot, "the face of the work that shows to be measured and none else," evidence was admitted to show in what sense the words were used and understood in the trade.

Martin v. *Thresher*, 40 Vt. 461.

Under a contract to do mason work, the contractor may introduce experts in the trade to show that mason work does not include "plastering and whitewashing."

Highton v. *Dessau*, 19 N. Y. Supp. 395;
Cassidy v. *Fonthan*, 14 N. Y. Supp. 151.

In a contract to deliver marble "furnished and ready for setting," the meaning of these words as used by marble cutters may be proved by witnesses.

Myers v. *Tibballs*, 13 Pac. Rep. 695.

The words "grading, excavating, and filling" have been held ambiguous as used in a contract to make a street grading, and evidence was admitted to show their trade meaning.

Atlanta v. *Schmeltzer*, 10 S. E. Rep. 543.

Evidence has been admitted to show what deduction shall be made for "hollow and pecky logs" in measurement of inch board measure.

Destrehan v. *Louisiana Cyprus Lumber Co.*, 13 So. Rep. 230.

And it was held in the same case that evidence was admissible to show how to measure a log for its board measure—whether by its average diameter or by taking the diameter of the smaller end.

It has been held admissible to introduce evidence to show what "timber 12 inches heart and up" includes.

McKenzie v. *Wimberly*, 5 So. Rep. 465.

We submit that the like principles apply in the case at bar.

XI.

Where technical or trade language is used, or common words in a technical or trade sense, their meaning may be proven by persons who possess the peculiar knowledge and skill requisite.

In 2 Pars. on Cont., side pp. 555, 556, it is said:

> If a contract refer to principles of science or art, or use the technical phraseology of some profession or occupation, or common words in a technical sense, or the words of a foreign language, their exact meaning may be shown, as we have already remarked, by the testimony of "experts," who are persons possessing the peculiar knowledge and skill requisite for the interpretation of the contract.

If the contract has relation to a trade or business of a technical character, and is expressed in words having a technical or peculiar sense in such trade or business, resort must be had to the testimony of experts, or those acquainted with the particular art or business to which the words relate.

Railroad Co. v. *Rust*, 19 Fed. 239.

Accordingly, it is held that civil engineers may state their opinions as to the meaning of technical terms, so the court may ascertain the technical meaning attached to them by those most conversant with their use.

Reed v. *Hobbs*, 3 Ill. 297.

It is competent for a builder to testify what is meant among mechanics when the term "smokestack" is used.

Skelton v. *Light & Pow. Co.*, 100 Mich. 87, 90.

These citations might be multiplied indefinitely. It is not too much to say that the courts of last resort in England and America in hundreds of cases have approved and applied the rule which was rejected by the court below.

XII.

The authorities cited in the second opinion of the court below do not sustain its ruling.

In that opinion, Rec. 13, 14, it is held that the specifications are plain and unambiguous, and any other method of measurement in place, even though customary, is excluded by the terms of the contract, and expert testimony is not admissible to explain language that needs no explanation. Therefore, the court declined to consider the expert testimony in this case, and cited certain authorities, which we will review, as briefly as possible.

(a) The citations to the American and English Encyclopedia of Law must be to the second edition of that work, for when we look at volume 17, page 11, first edition, we find that it treats of criminal law, and if we try to find page 1110 in the 21st volume of that work, we see that the

volume ends with page 1096. Turning to the second edition of volume 17, at page 11, we find the following:

> Words in an instrument are to be given their plain, ordinary, and popular meaning, unless they have acquired a peculiar sense in respect to the particular subject-matter, as by known usage of trade or the like, or unless the context shows that the parties used them in some other and peculiar sense.

On page 10 of that volume it is stated that when words have a meaning in the trade or calling different from their ordinary and popular meaning, the parties will be presumed to have used them in their peculiar sense. Of course, that sense can only be shown by evidence.

(b) In 21 Am. & Eng. Ency. (2d ed.) 1110, the familiar rule is stated that when the instrument is clear and unambiguous on its face, and no intimation is given of a disclosure of a latent ambiguity, no evidence is admissible to give to it a construction other than that which is plainly expressed.

But, as is shown on page 1108 of that volume, that is but the corollary of the rule that a witness is not to be permitted to place a construction on the instrument, and the testimony must be confined to the *meaning of the* words in *dispute*.

And on pages 1104, 1105, 1106, 1107 of the same volume the rule is positively stated and illustrated that, when the instrument contains words of a technical or trade character, their meaning may be shown by evidence though they have a plain and ordinary meaning in common parlance.

(c) In 2 Pars. Cont. (9th ed.) 648, 710, 716, there is

not one word on the subject under discussion here, and there are not so many pages in the other volumes of that work.

(d) And in *Middlings Pur. Co.* v. *Christian*, 4 Dillon, 448–459, we have not found a word on the subject.

(e) In *South Bend Iron Works* v. *Cottrell*, 31 Fed. 254, Judge Shiras said:

> One question presented by the demurrer to the amended petition is whether, in construing the contract, the court can consider the meaning which it is averred custom and usage has thus given to this phrase. If in any business or trade, by well-known and established usage, certain terms or phrases have acquired a well-defined meaning, the presumption is that, when used in a contract between parties engaged in such trade or business, and cognizant of such meaning, the parties intended such to be the construction thereof. Where the language used in a contract is plain, and its meaning free from obscurity, proof of custom or usage, in contradiction thereof, is not admissible; but the language used in this contract, standing alone, is certainly somewhat equivocal and obscure; and in such case resort may be had to the well-defined and known usages of the trade, as an aid in reaching a true interpretation of the contract between the parties.

(f) In *Moore* v. *United States*, 196 U. S. 157, 166, Mr. Justice McKenna said:

> The effect of usage upon the contracts of parties has been decided many times. It may be resorted to in order to make definite what is uncertain, clear up what is doubtful, or annex incidents, but not to vary or contradict the terms of a contract.

We are not claiming in the case at bar that evidence as to the meaning of the words in the contracts and specifications was admissible to vary or contradict the terms of those instruments, but we do insist that it was admissible to "make definite what is uncertain, clear up what is doubtful."

This review of the authorities cited in the opinion below shows that, so far as they touch this case, they are diametrically opposed to the views there expressed.

We respectfully submit that the judgment of the court below should be reversed.

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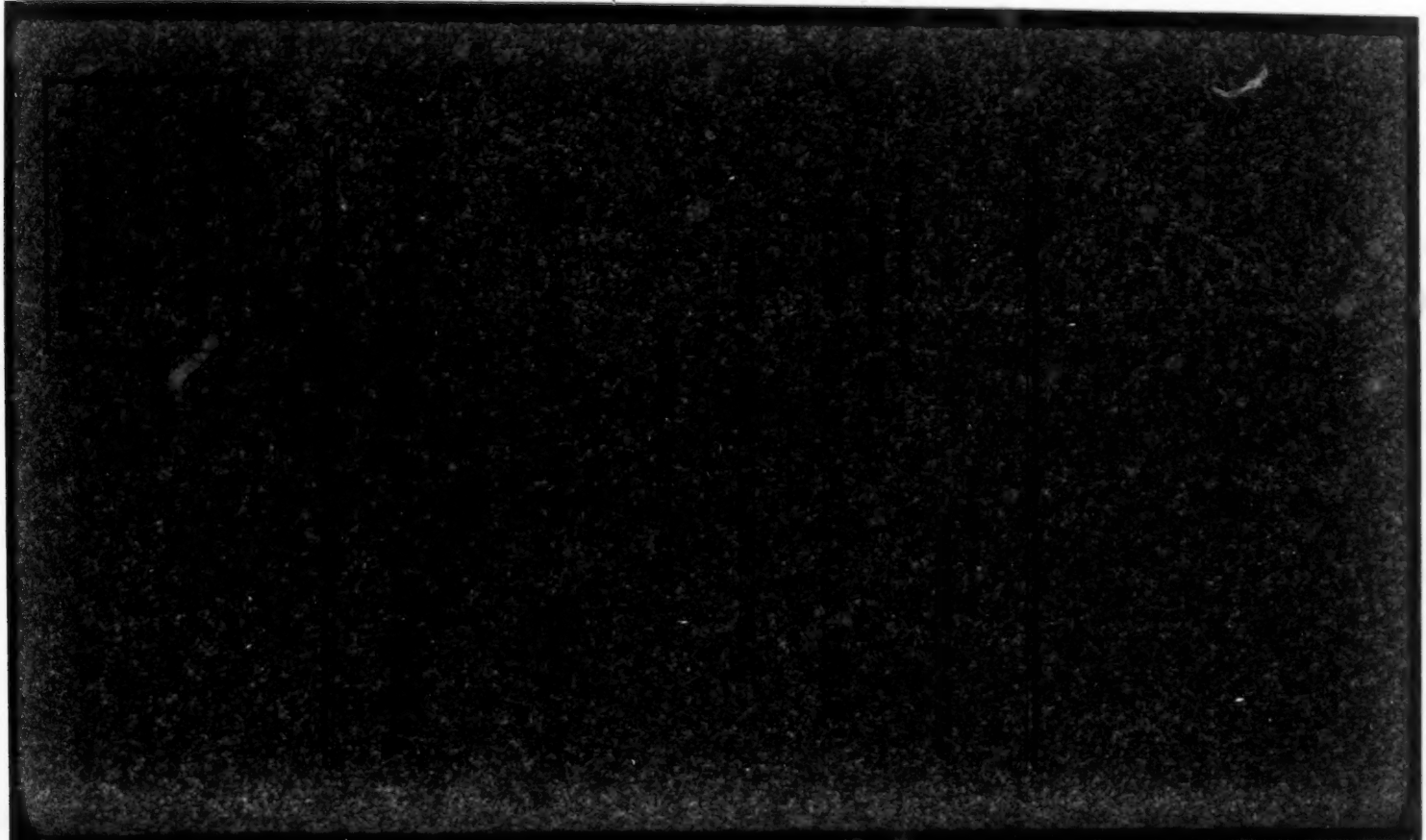

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE BOWERS HYDRAULIC DREDGING CO., Appellant, v. THE UNITED STATES. } No. 185.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Appellant entered into a contract with the United States on November 20, 1899, for dredging a channel in the Christiana River, Delaware. Under the specifications the said channel was to be 250 feet wide from the lower end to the mouth of the Brandywine; 200 feet wide from the mouth of the Brandywine to railroad bridge No. 4; and 100 feet wide from said bridge to the upper end of the proposed channel. The maximum depth of the channel was to afford 21 feet of water at mean low water, diminishing gradually to 10 feet at mean low water at the up-river end. The definite location of the channel was to be plainly indicated by stakes and ranges. (Trans., pp. 4 and 5.)

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The material to be removed in creating said channel was to be paid for at the rate of 10⅞ cents per cubic yard measured in place, and the amount thereof was to be determined by surveys made before dredging commenced and after it was completed. No material was to be paid for which was dredged from below the required depth, or outside the "designated lines of excavation."

At the time the project of making said channel was submitted for proposal, and for some time prior thereto, the New York Dredging Company was and had been engaged in dredging a channel in said river over the same course under a contract containing the same or like provisions with the contract in the case at bar with reference to the measurement of the material to be paid for. Subsequent to the date of the contract in the case at bar and before actual performance thereof had been commenced, it came to the knowledge of appellant that a dispute, or disagreement, had arisen between the Government and said New York Dredging Company with reference to an allowance for material coming from outside the perpendicular lines of the channel during the progress of the dredging; and that General Smith, the United States agent or engineer in charge, had decided that material so derived, even though dredged and deposited by the contractor, was not, under the contract, to be paid for. Thereupon the appellant addressed a letter to said United States agent asking what construction would be placed upon that part of its contract which related to the quantity of material which would be paid for.

The decision of General Smith in the matter of the dispute with the New York Dredging Company having been appealed to the Secretary of War, he forwarded said request of appellant to the Chief of Engineers of the War Department for instruction, and that officer instructed him, with the approval of the Secretary of War, to pay appellant *only* for the material in place within the designated lines of excavation, and not for such material as should be drawn into the rectangular prism thus described during the progress and as a result of the dredging. This information was promptly conveyed to appellant by General Smith, and a protest was filed at the time, and thereafter, on the occasion of the receipt of each payment for work done, a formal written protest was made against the exclusion of material from the slopes of the channel. (Trans., pp. 7 and 8.)

Suit was brought in the Court of Claims by appellant on the 14th day of June, 1902, claiming judgment against the United States for the excavation of some 260,000 cubic yards of material dredged, alleged to have been derived from the sides or slopes of the channel outside the perpendicular line thereof. Judgment was rendered by the Court of Claims in favor of the United States on the 12th day of March, 1906. (41 Ct. Cls., 214, Trans., p. 9.)

A motion for new trial and to amend the finding of fact was overruled with an opinion on the 19th day of November, 1906. (41 Ct. Cls., 498, Trans., p. 13.)

ARGUMENT.

The Court of Claims held, in effect, that the method by which the material excavated was to be measured for payment was clearly and unequivocally expressed in the contract and followed by the United States engineer in charge. The appellant contends (first assignment of error) that the court was in error in so deciding; that it should have heard and weighed certain expert testimony offered to explain the meaning of certain words used in the contract (fourth assignment of error). The second assignment of error is covered by the first, and the third is covered by the fourth, for it follows that if the court below erred in dismissing the petition it erred in overruling the motion for a new trial; and if it should have admitted and weighed the expert testimony offered, it should have made a finding on the subject of said testimony, though it does not follow that the finding would have been the one proposed by the plaintiff below.

The construction or interpretation of a contract has been defined to be the ascertainment of the intention of the parties as *expressed* therein:

> Am. and Eng. Ency. L. vol. 17, p. 2, 2d ed.
>
> Jones on the Construction of Com. and Trade Contracts, p. 1.
>
> Anderson's Law Dictionary, p. 240.
>
> The very idea and purpose of construction implies a *previous* uncertainty as to the meaning of the contract, for where this is clear and unambiguous there is no room for construction and nothing for construction to do.

Parsons 2d, bottom p. 655, 9th ed.
Am. Ency. of Law, vol. 17, p. 4.
Id., vol. 21, pp. 1109, 1110.
Jones on Construction, etc., pp. 31, 111, 237, 267.
Moran v. *Prather*, 23 Wall., 492, 500.
Culber v. *Wilkinson*, 145 U. S., 205, 212.
Iron World v. *Cottrell et al.*, 31 Fed. Rep., 254, 256.

It follows from the principle above stated, which is amply supported by the authorities cited, that the first duty of the trial court in the case at bar in considering the question of the admissibility of the expert testimony offered was to examine the contract with a view of discovering whether or not there was any ambiguity, patent or latent, therein, or any uncertainty or doubt as to the meaning of any of its terms or provisions, and, none being found, it was both proper and right to exclude said testimony.

The first duty of the court was to give force and effect to the contract as *written*, if possible.

On the other hand, if the court, upon such examination of the contract, should be in doubt as to the meaning of any of its terms or provisions, it might then proceed to apply the well-known rules of construction, among which, though not of first importance, is the rule that expert testimony may be admitted to explain the trade, or technical, meaning of words or phrases.

The contention of appellant is that the words "measured in place" have, and had at the time of the

matters complained of, a particular and technical meaning when used in connection with contracts for dredging, which, if it had been adopted and followed by the United States engineer in charge, would have changed the rule or principle upon which the measurements for payment were made.

The contract provides that "the amount of the material removed will be paid for by the cubic yard, measured in place." (Par. 43 Trans., p. 5.) If this were all, it might with propriety and reason be claimed that there was a necessity for extrinsic evidence to aid the court in ascertaining the proper meaning of those words. But it will be observed that in the very same paragraph in which the language above quoted occurs it is provided that the number of cubic yards to be paid for—that is to say, the material "measured in place"—shall be "*determined by surveys made before dredging is commenced and after it is completed.*" Moreover, it is provided in the forty-fourth paragraph (Trans., p. 5) that "work done *outside* of the designated lines of excavation or *below* the specified depth *will not be paid for.*" These two provisions of the contract certainly render clear the meaning of the words "measured in place." It will not do to tear those words from the context and consider them as standing alone or as the only words to be considered in giving effect to the contract.

One of the cardinal principles of the construction of contracts is that the *entire* contract must be considered.

These words, "measured in place," were undoubtedly used in the preparation of the specifications and in the contract to make clear the fact that the material excavated was not to be measured in scows. If it had ended with the mere statement that it was to be "measured in place" there might well have been some doubt about where the place to be measured was; there might be measurement in place before excavation, or there might be a measurement of the place into which the material was deposited, as in the case of filling up a basin or a ravine or a depression in the surface of the earth anywhere; it is just as easy of calculation to determine the amount of material excavated by one method as by the other, but when we have it plainly stated that the material is to be "measured in place" and the amount to be determined by surveys made "before dredging is commenced and after it is completed," no doubt can be left in the mind of an unbiased person that the measurements "before dredging is commenced" must be taken to a fixed and definite point, which we think it is clear could not have been made if the uncertain slopes were to be considered.

It was further provided in the contract (par. 45, Tran., p. 5) that the work to be done—that is, the channel to be cut—should be plainly located by stakes and ranges; in other words, the *bottom width* of the channel to be cut, as well as its relative location in the bed of the stream, was to be indicated by stakes and ranges so that it would be possible for the

dredger to know to what point he must carry his dredging operations in order to construct the channel of the required width. It would have been impossible to set these stakes and ranges so as to indicate the limits of the "slope," because no one could foresee to what extent the sides of the excavation might slough off. It, therefore, follows that these stakes and ranges indicated the "designated lines of excavation."

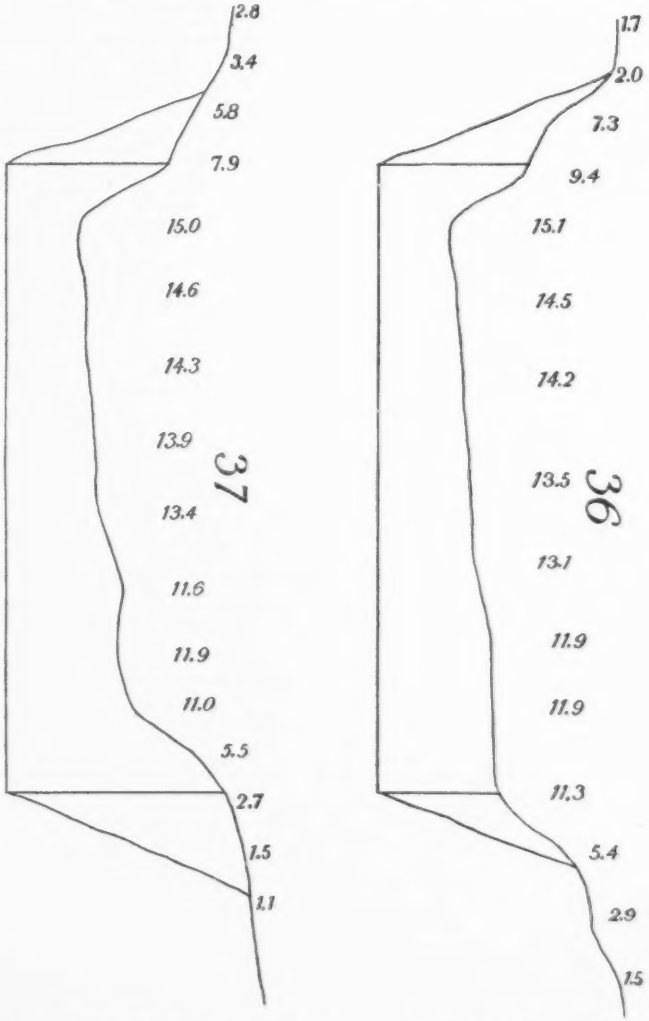
After the stakes and ranges were set and before any material was removed a survey was to be made for the purpose of determining how much material lay within the "designated lines of excavation." After the material had been excavated and immediately following the dredge another survey was to be made for the manifest purpose of ascertaining whether or not the dredger had excavated to the required depth within the "designated lines of excavation." If he had, then under the conditions of the contract the contractor was entitled to be paid for the material in the place measured, which would, of course, be the prism described by the first survey mentioned. Nothing could be plainer than this. It is not seen how language could be framed which would make any more certain and definite the method of measurement.

Let us see how this would work out as a practical proposition. Here is a channel to be cut, we will say, 200 feet wide to a depth which will give 21 feet of water at mean low water; it extends longitudinally

with the river; its location in the river is located by stakes and ranges. Before any material is dredged from the channel so located and designated the "engineer in charge or persons employed by him for that purpose" must make a survey for the purpose of ascertaining the amount of material which is lying in the place to be excavated, which is to say the amount of material lying within "the designated lines of excavation." The first process must necessarily be sounding to ascertain the contour of the bed of the stream. These soundings are usually taken at every 10 feet across the channel at a given point. The engineer then proceeds to another point along the proposed channel, say 100 feet distant from the first point, and makes similar soundings. With these data before him he may easily and accurately determine the amount of material *to be removed*.

The figures on page A, subjoined, will best serve to make clear the method provided in the contract, and followed by the engineer, of measuring the material for which the contractor was paid. It is proper to say that these figures are taken from appellant's exhibits in the Court of Claims and are used here for the purpose of illustration only. The cross sections so illustrated were taken at stations 36 and 37, respectively, which stations were 100 feet apart. The irregular transverse line indicates the surface of the bed of the stream before dredging; the horizontal line indicates the depth to which dredging was to be carried in order to produce the required draft of

water; the perpendicular lines indicate the vertical sides of the channel to be cut; the diagonal lines indi-



cate the slopes which it is assumed by the appellant the channel took during the process of dredging.

Let it be remembered that the stakes and ranges indicating the location of the channel showed its width, and the soundings constituting the preliminary survey were taken between these lines and beyond to practically the banks of the river. It was comparatively an easy matter to calculate the amount of material lying in the rectangular prism thus described. The survey made after dredging was completed was merely to determine whether the material lying within said rectangular prism had been entirely removed. If the contractor removed all of said material, he was then entitled to the compensation agreed upon for removing it; if he had not, he must continue to dredge until it was removed. If he excavated any material below the required depth, as indicated by said horizontal line, it was not to be paid for; if he excavated any material outside the "designated lines of excavation," which we say were the perpendicular lines, he was not to be paid for it.

The appellant's contention is that the engineer should have calculated the material lying within the triangle described by the diagonal line, the original surface of the bed of the stream, and the perpendicular line, because it is claimed the material lying within the said triangle either sloughed off into the channel or was loosened by the dredger so that it fell into the channel and was afterwards removed by the contractor.

Whether the material which lay within the said triangle actually fell into the rectangular prism

described is not a question for discussion in this court. We will assume that it did; inevitably some of it would. If it came in during the process of dredging, it, of course, had to be removed in order to make the channel of the required width and depth, and the contractor would receive no compensation for removing it, because it was not in the place measured by the first survey when said survey was made. If it came in after the survey which followed the completion of the dredging, the contractor was not required to remove it.

There is no possible way by which the engineer could ascertain or determine from the preliminary survey or measurement the amount of material which might fall into the channel from outside the vertical lines above described, or which might be dragged into it by the operations of the dredger. He could not set a stake or range to which the sloughing off might extend. The character of the material to be dredged varied greatly; in some places the sides of the channel might stand almost perpendicular after dredging; in another place they might take a slope of 2 on 1; at still another they might take a slope of 3 on 1, or more, and all these conditions might obtain between any two stations which, it will be remembered, were 100 feet apart. It was not contemplated by the contract that any stakes or ranges should be set to indicate the *slope* which the excavated area might assume naturally or be given by cutting. It was, moreover, an utter impossibility for the engineer

to make a *preliminary* survey which would determine the location of said diagonal lines. These lines being uncertain, he could not have determined *beforehand* the amount of material "in place." It was an easy matter, however, for him to determine the amount of material which lay within the "designated lines of excavation."

The only way in which the material actually removed from the triangular space indicated could be determined would be by a survey made *after* dredging was completed, in which case the engineer would necessarily have to take soundings to ascertain the point to which the sloped side of the channel extended. Having determined this, it would of course be an easy matter to calculate the amount of material within the triangle, which, added to the amount within the original rectangular prism measured and described by the first survey—that is to say, the survey "before dredging is commenced"—would give the exact amount of material removed by the contractor; but clearly this would not be measuring the material removed "in place" or determining the amount thereof by a survey "*before dredging is commenced and after it is completed*," nor would it be within the terms of the contract, which provides that no material removed from "*outside the designated lines of excavation*" should be paid for, it being perfectly clear that no line of slope could be "*designated*."

So it would appear that the contract in question provides a clear, complete, and certain method of

measuring the material excavated and to be paid for. Such being the case, it follows, as a matter of law, that no extraneous evidence was admissible for the purpose of explaining or contradicting the terms thereof. The appellant ought to have known this when it submitted its bid.

The plain terms of the specifications referred to so often were sufficient in themselves to have given the bidder this understanding, and, in addition thereto, there was the fact that the engineer office in submitting the matter for proposals made a rough calculation of the amount of material to be removed in creating the channel described (thirty-seventh par., Trans., p. 4). Bidders were invited to examine the site and make estimates for themselves; moreover, there were maps and drawings showing the condition of the channel at the time said estimate was made up.

These maps and drawings consisted of the progress sheets of the work done under the New York Dredging Company's contract. (Trans., pp. 4 and 5.) Had the appellant made even a rough estimate of the amount of material lying within the channel to be excavated as shown by the specifications and said maps and drawings, it would have discovered unmistakably that the engineer in making said calculation did not include anything for material derived from outside the vertical sides of the channel to be cut. It is true that a larger amount of material was found in the bed of the stream where the channel was to be

cut than the engineer even had anticipated, and a supplementary contract increasing the approximate amount of material from 900,000 cubic yards to 1,350,000 was entered into. This large increase, however, was not due to material falling into the cut being made by the appellant under its contract, but was manifestly material which came into the cut which was being made by the New York Dredging Company subsequent to the survey made showing progress on said contract and prior to the preliminary survey made in the contract in the case at bar.

A very considerable part of appellant's brief (pp. 5–19) is devoted to a discussion on the question of the finality of the United States engineer's decision with reference to the measurements made upon which payments were based. If the method or principle upon which the measurements were actually made was in accordance with the terms and provisions of the contract, it can make no difference whether the engineer's decision to follow said method was final and conclusive or not. It is argued that the engineer officer in charge submitted the dispute between him and the appellant as to the character of the measurements to be made under the contract to the Chief of Engineers for *instructions*, whereas the contract provided that the appellan should have the benefit of the judgment of the engineer officer himself.

As above suggested, it makes no difference how the engineer reached his conclusion, whether by

instructions, by intuition, or by careful and conscientious consideration of the subject, so long as the decision was in accordance with the plain terms of the contract. In passing, however, it is proper to say that, in our opinion, the appellant got the full benefit of the best judgment of the United States engineer, notwithstanding the fact that he sent the appellant's request to the Chief of Engineers for instructions. It must be remembered that at the time the appellant's request was preferred to the United States engineer in charge he had decided in a similar case to follow the construction of the contract with reference to measurements here complained of. This fact was known to the appellant; indeed, it was the knowledge of this fact which inspired the appellant to make the inquiry. When this inquiry, or request, reached the engineer in charge, his decision in the other case was before the Secretary of War for review on appeal taken by the contractor, and quite naturally said engineer officer referred the matter to the Secretary of War in order that he might be instructed to follow his former decision or abandon it according as the appeal should be decided. But it is unnecessary to further discuss this feature of the case, for the Government does not rely upon the *conclusiveness* of the engineer's decision, but upon its *righteousness*, legally speaking.

It will be conceded that the question of the principle upon which the measurements were to be made was a matter of the construction of the contract,

and consequently one in which the decision of the engineer would not be final and conclusive even though the contract itself provided that it should be. The law, as we understand it, was well stated by Chief Justice Nott speaking for the court of Claims in the Barlow case. (35 Ct. Cls., 514, 545 et seq.) That case was reviewed by this court, but it was not found necessary to pass upon the question of the finality of the engineer's decision. (184 U. S., 123, 134.) The construction of contracts is a province of the court to be exercised under the rules of law and can not be conferred by agreement.

If the decision of the Court of Claims is not a correct interpretation of the intention of the parties as expressed by the terms of the contract; if it does not furnish a reasonable and practical application thereof, then it must be conceded that the court was in error in dismissing the petition and the case must be remanded with instructions to hear evidence to explain the doubtful or uncertain terms found therein. Otherwise the judgment should be affirmed.

The appellant's brief (pp. 39–43) discusses the proposition whether or not the question of the admissibility of the expert testimony has been saved by the record so that this court can pass upon it. The Government offers no objection to the consideration of the question raised; indeed it is strongly desired that the court shall pass upon this question. It is a matter which concerns not only the Department of

Justice, but the Court of Claims. It seems to us there ought to be a clearer understanding as to the nature and character of the Court of Claims' findings of fact.

It has been the general practice of the Court of Claims to make a finding upon almost every question of fact submitted by either party. The manifest purpose of making such broad findings of fact is that the party appealing to this Court may have the benefit of a finding covering every possible view of the case. For instance, in the case of *Moore & Co.* (196 U. S., 157) the Court of Claims found the facts as to the custom or usage which existed at the port of San Francisco and, although it was held that this usage or custom could not in any way affect the contract which was made in that case, the finding was made nevertheless. It was a useless piece of labor for the court and was entirely unnecessary to a proper review of the case in this Court. So in the case at bar it would have been useless for the Court of Claims to have made a finding showing the trade meaning of the words "measured in place." True, it might have done so without error, but such a finding, we submit, was only *necessary* in the event that the court was unable to construe or apply the contract without the aid of extraneous testimony to explain the meaning of its terms.

The authorities cited in the appellant's brief (pp. 45–51), in support of the contention that the expert testimony offered should have been admitted, are none of them apposite.

The first case cited is that of *Elgin* v. *Joslyn* (136 Ill., 535). The report in this case does not show in what relation the doubtful words stood. The term "mason work" might very well be a matter requiring explanation or elucidation if it stood alone; so might the meaning of the words "measured in place" be a matter of such doubt and uncertainty as to warrant the court in hearing the testimony of experts in the business of dredging were it not for the explanatory phrases and qualifying words in the contract.

The case of *Brennaman* v. *Bush* (30 S. W. Rep., 699) was decided in the Civil Appeal Branch of the Supreme Court of Texas. The question arose as to whether the stone constituting the masonry was to be measured in the wall after its erection, and if so whether the corners should be counted once or twice and whether any deductions should be made for doors and windows in the wall. There were no words of explanation in the contract itself so far as the report of the case indicates. It is always allowable to prove the custom or the trade meaning of words and phrases where the contract is silent, but the contract in the case at bar was not silent. It provided the method of measurement and thus excluded any custom there may have been contrary thereto. (*Moore & Co., supra.*)

In the case of *Martin* v. *Thrasher* (40 Vt., p. 461) there was a referee who heard evidence as to the meaning of the phrase "the face of the work that shows to be measured and none else," but excluded

testimony offered to prove what the parties to the contract said about the meaning of those words during the negotiations between them which led up to the contract. The question which the Vermont Supreme Court was reviewing was the action of the referee in excluding this testimony. The testimony to explain the trade meaning of those words was apparently offered and received without objection. The court, however, in passing upon the other question, took occasion to say the referee had acted within the law in excluding the evidence offered on the one hand and admitting that offered on the other. It must be remembered that the referee had no power to construe the contract.

The case of *Cassidy* v. *Fonthan* (14 N. Y., Supp. 151), cited and followed by the same court in 19 New York, is not in point either. The question in that case was whether a plumber under his contract "to furnish all materials and labor for plumbing" was obliged to furnish ranges. He certainly was not unless ranges were plumbing. An issue was raised on the pleadings as to this and testimony was heard to prove the custom of the trade. There is no analogy, however, between that case and the one at bar. If the contract in the New York case had contained a clause explaining what was to be included in plumbing, there would have been no room for dispute; just as in the case at bar the contract shows how material which is to be "measured in place" shall be measured—by surveys before and after dredging.

In the case of *Myers* v. *Tibballs* (13 Pac. Rep., 695), decided by the Supreme Court of California, one of the contracting parties agreed to deliver marble "finished and ready for setting;" the other party claimed that some of the pieces furnished were not of the right length and were not polished or cut so they could be put in place without further labor. Testimony was introduced, without objection, to show what was the meaning in the trade of the phrase "finished and ready for setting" as used in the contract. The court held that these words were undoubtedly used in a technical sense. Therefore, it was admissible to explain them by parol evidence, but in the case at bar there were no words or phrases used in a technical sense so far as the issues in this case are concerned.

In the case of *Atlanta* v. *Schmeltzer* (10 S. E. Rep., 543) the court simply held that, taking the whole contract together and considering the connection between it and a certain plan adopted by the city for improving a street, the words "grading, excavating, and filling" were ambiguous, and evidence was admitted to show their trade meaning.

In the case of *Destrehan* v. *Lumber Company* (13 Southern Rep., 230) the gist of the decision is that the parties not having covered a certain matter in their agreement, evidence as to the custom with relation thereto was properly admitted.

So far as the principle running through these decisions concerns the case at bar, it supports the argument adduced in this brief, to wit, that the court must

find, from a careful examination and consideration of the contract itself, some ambiguity or uncertainty as to the meaning of specific terms and provisions therein before it admits parol evidence to explain the same.

In the appellant's brief (p. 29) the case of the San Francisco Bridge Company (40 Ct. Cls., 139) is cited in support of appellant's contention—that the engineer in the case at bar should have ascertained definitely just how much material came into the channel being excavated from outside the vertical sides thereof.

The provision of the contract in the case at bar and in the *Bridge Company case* are not identical. In the latter case it was provided that:

> All material shall be measured in place, the amount excavated being determined by careful surveys immediately before and after dredging. *No allowance will be made for increase in bulk in removal.*

The statement is made in appellant's brief that an examination of the record in said case in the Court of Claims will show that the Government officers so interpreted the contract in that case as to authorize them to pay for the material that came into the cut or excavation from the sides, and that they made such payment (p. 30). It is submitted that an examination of the records will disclose nothing of the kind. The contrary, we think, will appear.

The issue in the San Francisco Bridge case grew out of the fact that the engineer in construing the contract had required the contractors to go back over

the channel cut and remove material which had drifted or settled into the cut subsequent to the last survey made—that is, the survey made after the dredging. There was no dispute about excavations first made or payments therefor. But it would seem to follow, as an irresistible conclusion, that if the engineer held that under the contract they were required to go back over the channel weeks and months after they had once completed it and remove material which came in from the sides without further compensation, he must have held that they were required to excavate such material as came in from the sides during the progress of dredging without other compensation than that received as a part of the price named in the contract. The Court of Claims held, and it was the only point decided, that the contractor in that case was not required to *maintain* the channel; that if he once completed it to the required width and depth he had performed his contract. But, however the engineer may have actually measured the material for payment, the contract did not warrant him in including any material which might fall or slide into the cut from the sides thereof.

So in the case at bar the contractor could not have been compelled to go back over a section which had been once dredged to the required depth and width and remove material which might have come in from the sides of the channel or otherwise. The converse of this proposition is likewise true; that is to say, the contractor *could* be compelled, or at least

was obliged under the contract, to remove *all* material necessary to create in the first instance a channel of the required width and depth, without compensation other than that provided in the price paid for removing the material lying within the rectangular prism. The contractor knew or ought to have known that *some* material would naturally come into the channel during the process of dredging, and it must be presumed that in fixing the price named in the contract the necessity for the removal of all such material was taken into consideration.

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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908

THE BOWERS HYDRAULIC DREDGING COMPANY,
Appellant,

vs.

THE UNITED STATES.

No. 9

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

BOWERS HYDRAULIC DREDGING COMPANY, *Appellant*,

vs.

THE UNITED STATES.

No. 185.

I.

On pages 5 and 6 of the appellee's brief it is said that the first duty of the trial court in considering the question of the admissibility of the expert testimony was to examine the contract with a view to discovering whether or not there was any ambiguity, patent or latent, therein, or any uncertainty or doubt as to the meaning of any of its terms or provisions, and, none being found, it was both proper and right to exclude the testimony. This position is said to follow the statement of the rule that the consideration or interpretation of a contract is the ascertainment of the intention of the parties as *expressed* therein.

We ask how we can get at the "expressed" intention of the parties when the contract contains trade

or technical words, or common or ordinary words used in a technical sense in the trade? The parties here used words in a technical or trade sense in the expression of their intention or agreement. How can a court ascertain the intention of the parties to such a contract, except by allowing the technical or trade meaning to be proven by the testimony of witnesses familiar with it? See our argument and authorities on pages 44-51 of our original brief, in which it is established by reason and by authority that evidence is admissible to prove that the words in which the contract is expressed have a trade or technical meaning, in the particular trade to which the contract relates, and what that meaning is.

The appellee argues that such evidence is admissible only where there is ambiguity or uncertainty as to the meaning of any of the terms or provisions of the contract, and if there be no such ambiguity or uncertainty or doubt in the mind of the court, testimony of that character should be excluded. That view would preclude the introduction of evidence to show that words of a common or ordinary meaning were used in the contract in a trade or technical sense, despite the overwhelming weight of authority to the contrary, cited and discussed on pages 44-51 of our original brief, including *Garrison* vs. *Memphis Ins. Co.*, 19 How., 312, 313, and *Cadwalader* vs. *Zeh*, 151 U. S., 171, 176, and cases cited.

To use a homely illustration, the word "crowbar" is one of common and ordinary meaning, and yet it may be used in a trade or technical sense in a contract. The position taken by appellant is that,

in a case predicated on such a contract, evidence would be inadmissible to show that the word was used in a trade or technical sense and to prove its trade or technical meaning. The authorities and the reasoning are the other way.

II.

On pages 6 to 15 appellee presents its views of the meaning of the contract and specifications. Our views are set forth on pages 22-37 of our original brief. On pages 33 to 35 of that brief we state how those skilled in the dredging trade would understand and interpret the contract and specifications. We did not evolve that argument ourselves, for it was taken from the evidence of eminent experts put in the record below in the form of depositions.

In addition to the argument made in our original brief on this branch of the case, we now ask the court's attention to Finding III, Rec. 6, which sets forth the material part of the contract. It will be observed that the contract stipulated that in consideration of furnishing the labor, machinery and appliances necessary or proper for the faithful execution of the contract, the appellant should "receive 10⅞ cents for each and every cubic yard of material dredged, measured in place, the said price including removal and redeposit." How could "each and every cubic yard of material dredged, measured in place," be paid for without including or counting what came into the channel or cut from the sides? Please consider in this connection the cuts on page 10 of appellee's brief. Those cuts furnish admirable

illustrations of the arguments set forth in our original brief, and we thank counsel for the appellee for producing them in this convenient form.

The contract provides that *each and every cubic yard of material dredged, measured in place,* shall be paid for. If that langauge differs from the specifications it must be given controlling force, for it is the language of the contract.

III.

On page 18 of appellee's brief it is said that it has been the general practice of the Court of Claims to make a finding upon almost every question of fact submitted by either party, in order that the party appealing to this court should have the benefit of a finding covering every possible view of the case. We think that practice not only commendable but absolutely essential to the end that justice may be done by having every fact brought before this court, so that the rules of law may be correctly and adequately applied to the proven facts of the case. The practice in the Court of Claims does not permit the making of a bill of exceptions for the purpose of putting the testimony into the record and saving questions of law and fact in that way. Except through the findings of fact there is no way to get the facts of the case, and the question of the admissibility of evidence, before this court for review.

Counsel for appellee cite the case of *Moore & Co.* vs. *United States,* 196 U. S., 157, where the Court of Claims found the facts as to a custom or usage existing at the port of San Francisco, and counsel

say: "It was a useless piece of labor for the court and entirely unnecessary to a proper review of the case in this court." No labor in a case is useless which enables the court of last resort to know the facts and apply the law; on the contrary, such labor is absolutely necessary.

Counsel then say that, in the case at bar, it would have been useless for the Court of Claims to make a finding showing the trade meaning of the language used in the contract. It may well be that, if the Court of Claims had found the trade meaning of those words, its judgment would have been such as to preclude the necessity of appealing the case to this court. Again, if that court had found correctly the trade meaning of those terms, it would be within the power of this court to direct the court below what judgment to render, in case this court should hold that the court below erred in not considering the evidence introduced by the appellant on that subject.

We submit that a party is entitled to "a fair bill of exceptions" where a bill of exceptions is allowable. That rule is universal. Is not a party entitled to a full statement of all the facts, when the reviewing court can only get the facts from the findings made? Can justice be done in any other way? Shall the Court of Claims be allowed to withhold a finding on a particular question of fact and thus effectually deprive the party of the benefit of all appeal to this court? To answer that question in the affirmative is to make it impossible in many cases for the ruling of the Court of Claims to be considered and reviewed in this court.

IV.

At the bottom of page 18 counsel for the appellee assert that the authorities cited in our original brief, pages 45-51, in support of our theory that the expert testimony should have been considered by the Court of Claims, are none of them apposite, and on the following pages they undertake to support that assertion by criticising seven only of our authorities. Even if the criticism of those seven cases were just, it cannot minimize the force and applicability of the rule that it is admissible to prove by evidence that the language used in the contract is technical or trade language, or common words used in a technical or trade sense, and then prove the trade or technical meaning of those words.

Respectfully submitted,

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BOWERS HYDRAULIC DREDGING COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 9. Argued November 11, 1908.—Decided November 30, 1908.

Where words used in a contract are plain and unambiguous, expert testimony, as to their commercial signification, is not admissible for the purpose of destroying the plain and obvious intendment of a contract; and so held that where a Government dredging contract by its terms expressly excluded material which slid into the excavation from the slope outside of the stakes, expert testimony to show that the trade meaning of the words "measured in place" includes such sliding material if dredged was properly excluded.

After the Government has, against the contractor's protest, affixed a meaning to terms used in a contract, the contractor cannot reassert the same claim in regard to a supplementary contract for additional work of the same nature even if the original contract were susceptible of the construction claimed by him.

41 C. Cl. 214, 498, affirmed.

THE facts are stated in the opinion.

Mr. L. T. Michener, with whom *Mr. W. W. Dudley* and *Mr. P. G. Michener* were on the brief, for appellant:

The language of the contract is plain. The decision of the engineer in charge was required; not the decision of the chief of the corps; not the decision of the Secretary of War; not obedience to instructions. *Mansfield &c. R. Co.* v. *Veeder*, 17 Ohio, 204, 385; *Baldwin's Case*, 15 C. Cls. 297, 303; *King's Case*, 37 C. Cls. 428; *Kendall* v. *United States*, 12 Pet. 524, 608.

The power vested in the engineer in charge was such that he could not delegate it, nor could any one else, assume it, no matter how high his station, nor could it be discharged by a subordinate. *Archer* v. *Williamson*, 2 Harris & Gill (Md.), 62; *Wilson* v. *York &c. R. Co.*, 11 Gill & J. (Md.) 59, 72; *Weeks* v. *Boynton*, 37 Vermont, 297; *Eastern R. Co.* v. *Eastern Union R. Co.*, 68 Eng. Ch. 463; *Lingnood* v. *Eade*, 2 Atk. 501; *Proctor* v. *Williams*, 8 C. B. (N. S.) 386; *Whitmore* v. *Smith*, 5 H. & N. 824; *Little* v. *Newton*, 2 Scott N. R. 509.

The engineer in charge had the right to ask information from disinterested persons, but not from his superior officers, for they were not disinterested. *Soulsby* v. *Hodson*, 3 Burr. 1474; *Caledonia Ry. Co.* v. *Lockhart*, 3 Macq. 808; *Anderson* v. *Wallace*, 3 Cl. & Fin. 26; *Eads* v. *Williams*, 3 DeG., M. & G. 674; *Hopcraft* v. *Hickman*, 3 L. J. Ch. 43.

If the engineer officer proceeded upon a wrong or mistaken interpretation of the contract, the court will give relief, notwithstanding the provision that his decision shall be final. *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17; *Lewis* v. *Chicago &c. R. R.*, 49 Fed. Rep. 708; *Alton R. R. Co.* v. *Northcott*, 15 Illinois, 49; *Starkey* v. *DeGroff*, 22 Minnesota, 431; *M. & G. R. R. Co.* v. *Veeder & Co.*, 17 Ohio, 385; *McAvoy* v. *Long*, 13 Illinois, 147; *Williams* v. *Chicago &c. Ry. Co.*, 112 Missouri, 463, 493–495; *Herrick* v. *Ver. Cent. R. Co.*, 27 Vermont, 673; *Kidwell* v. *B. & O. R. R. Co.*, 11 Gratt. 376; *Kistler* v. *I. & St. L. R. Co.*, 88 Indiana, 460; *Beckwith Case*, 38 C. Cls. 295, 314.

In performing the functions conferred by such stipulations, the engineer must have strict regard to the terms of the contract. His duties are to be ascertained from it, and his powers are limited to what it confers, or clearly implies. He cannot go beyond it nor behind it. His powers are not to be enlarged by implication beyond the plain words used. *Launman* v. *Younge*, 13 Pa. St. 306; *Williams* v. *Chicago Ry. Co.*, 112 Missouri, 466; *Sawtelle* v. *Howard* (Mich.), 62 N. W. Rep. 156.

In the case at bar, the engineer went beyond the contract and asked his superior officers to instruct him how to decide, although the sole power of decision was vested in him by the terms of the contract and specifications prepared and furnished by the United States and which are to be taken most strictly against the Government, liberality of construction being in favor of the contractor. *Edgar Thompson Works Case*, 34 C. Cls. 205, 219; *Chambers Case*, 24 C. Cls. 387.

The subject-matter of the controversy must be clearly within the contract or specifications to take away the rights

of the court or jury, and the engineer's determination will be conclusive only when clearly within the powers conferred upon him. *Sanders* v. *Hutchinson*, 26 Illinois, 633; *Mills* v. *Weeks*, 21 Illinois, 596; *Launman* v. *Younge*, 13 Pa. St. 306.

The engineer has no power to bind the parties when he goes beyond the terms of the contract or misinterprets it. *Starkey* v. *DeGroff*, 22 Minnesota, 431; *Alton R. R. Co.* v. *Northcott*, 15 Illinois, 49; *Grant* v. *Savannah R. Co.*, 51 Georgia, 348; *Kistler* v. *I. & St. L. R. Co.*, 88 Indiana, 460.

The engineer's decision or estimate is a conclusive adjudication only upon the condition that it is made according to the contract. *Drehew* v. *Altoona*, 121 Pa. St. 401; *Williams* v. *Chicago &c. Ry. Co.*, 112 Missouri, 463, 472, 473, 493-495; *The Beckwith case*, 38 C. Cls. 295, 299, 314.

The engineer should have determined the amount of the material excavated and removed by means of surveys made before and after dredging and by calculations based thereon.

When the contract provides that the engineer shall determine the amount of work, it does not give him the exclusive determination of the manner in which it shall be done according to contract. It does not give him the interpretation of the contract. *G. H. & S. A. Ry. Co.* v. *Henry*, 65 Texas, 685; *G. H. & S. A. Ry. Co.* v. *Johnson*, 74 Texas, 256; *Williams* v. *Chicago Ry. Co.* (Mo.), 20 S. W. Rep. 631.

The contractor may show that the engineer misconstrued the contract in his classifications of the work, and did not measure the work according to the contract, and he may show these things by evidence without alleging fraud. *Collins and Farwell case*, 34 C. Cls. 294, 332; *Beckwith case*, 38 C. Cls. 294, 299; *Williams* v. *Chicago Ry. Co.*, 112 Missouri, 463; *Lewis* v. *Chicago Ry. Co.*, 49 Fed. Rep. 708; *Summers* v. *Chicago Ry. Co.*, 49 Fed. Rep. 714; *Bridge Co.* v. *City of St. Louis*, 43 Fed. Rep. 768; *Lewis* v. *C. S. F. Ry. Co.*, 49 Fed. Rep. 708, 710.

The Government did not put language in the contract and specifications stating that material coming in from the sides should not be paid for.

There seems to be no reason why there should not be applied to the contract and the specifications here the principle so often applied to statutes by this court, that if Congress desires to grant a given power, right or authority, it says so in express terms; and where it does not say so, the conclusion is that it did not intend to give any such power. *Tillson* v. *United States*, 100 U. S. 46; *Vicksburg R. R. Co.* v. *Dennis*, 116 U. S. 669; *United States* v. *Chase*, 135 U. S. 259.

The principles of interpretation are very similar, whether applied to contracts, to deeds, or to statutes. 2 Parsons on Cont., side p. 494.

The Court of Claims should have considered and given due weight to the evidence about the trade meaning of the words "measured in place," and should have found the technical or trade meaning of the words in connection with the other language of the specifications; evidence as to the meaning of those words and specifications was admissible and should have been considered by the court. 2 Parsons on Cont. (7th ed.), side pp. 555, 556; 1 Greenleaf on Ev. (14th ed.), § 280; 1 Elliott on Ev., § 605; 4 Wigmore on Ev., §§ 2458–2467; 1 Starkie on Ev., side pp. 653, 701; Jones on the Const. of Com. and Trade Contracts, §§ 62, 204.

See rule as stated by Mr. Justice Campbell in *Garrison* v. *Memphis Ins. Co.*, 19 How. 312, 313.

Mr. Assistant Attorney General John Q. Thompson, with whom *Mr. Philip M. Ashford*, Special Attorney, was on the brief, for appellee:

The construction or interpretation of the contract is the ascertainment of the intention of the parties as expressed therein. 17 Am. & Eng. Ency. L. (2d ed.), 2; Jones on the Const. of Com. and Trade Contracts, 1; Anderson's Law Dictionary, 240.

The very idea and purpose of construction implies a previous uncertainty as to the meaning of the contract, for where this is clear and unambiguous there is no room for construction and

nothing for construction to do. 2 Parsons, 9th ed., 655; 17 Am. & Eng. Ency. of Law, 4; 21 Am. & Eng. Ency. of Law, 1109; Jones on Construction, etc., 31, 111, 237, 267; *Moran* v. *Prather*, 23 Wall. 492, 500; *Culber* v. *Wilkinson*, 145 U. S. 205, 212; *Iron World* v. *Cottrell*, 31 Fed. Rep. 254, 256.

The first duty of the trial court in the case at bar in considering the question of the admissibility of the expert testimony offered was to examine the contract with a view of discovering whether or not there was any ambiguity, patent or latent, therein, or any uncertainty or doubt as to the meaning of any of its terms or provisions, and, none being found, it was both proper and right to exclude said testimony.

The first duty of the court was to give force and effect to the contract as written, if possible.

On the other hand, if the court, upon such examination of the contract, should be in doubt as to the meaning of any of its terms or provisions, it might then proceed to apply the well-known rules of construction, among which, though not of first importance, is the rule that expert testimony may be admitted to explain the trade, or technical, meaning of words or phrases.

But an examination of the contract which is the subject of controversy herein shows that its language is so plain and unambiguous as to leave no room for construction or interpretation, nor for the introduction of evidence as to the trade meaning of any of its terms and provisions, and the Court of Claims properly so decided.

Mr. Justice White delivered the opinion of the court.

The appellant, the dredge company, sued to recover $28,321.76. The relief sought was based on the averment that under a contract for dredging a channel, in the Christiana River and in or about the harbor of Wilmington, Delaware, made in 1899, and a supplementary contract made in June, 1901, the dredge company had excavated 260,430 cubic yards

of earth, for which, at the contract price, it should have been paid the sum sued for, but that the United States, in making settlement under the contract, despite the protest of the dredge company, had declined to pay, upon the ground that excavating and removing the earth referred to was not within the contract. The pertinent facts found by the court below are these (41 C. Cl. 214, 498):

Prior to September, 1899, the United States was engaged in excavating a channel in the Christiana River and about the harbor of Wilmington, Delaware. The work, in September, 1899, was in process of execution, under a contract between the United States and the New York Dredging Company. In the office of the United States engineer in charge of the work there existed maps or drawings showing the condition of the river prior to any work being done by the New York Dredging Company, the location of the channel in which the work was being done, and the specifications controlling the contract, as well as the progress made in the work. Of these facts the dredge company had knowledge. On September 18, 1899, the United States engineer office at Wilmington, through William F. Smith, United States agent, advertised for proposals for the dredging and removing of about nine hundred thousand cubic yards of material in connection with the work then being done, as previously stated. In the advertisement inviting the proposals it was stated that specifications, blank forms for proposals, and all available information would be furnished on application to the engineer office. The specifications for the work in question recited:

"The project, for the completion of which contracts are authorized in the law above quoted, requires the dredging of the Christiana River to a depth of 21 feet at mean low water from the 21-foot curve in the Delaware River to the upper line of the pulp works; thence to the draw pier of the Shellpot branch, No. 4, of the P., W. & B. R. R., so as to give a depth which gradually diminishes to 10 feet at mean low water at the latter-named place and the removal of shoals having less

than seven (7) feet of water over them; thence to Newport—the width to be 250 feet to the mouth of the Brandywine, 200 feet thence to the upper line of the pulp works, and 100 feet above. Work is now in progress under contracts for dredging to a depth of 18 feet up to the pulp works, the width to be made being 200 feet, and for all above-described dredging above the pulp works. The work required under these specifications is the dredging that remains to complete the project additional to that done or to be done under the contracts above referred to until their termination or completion. It is estimated that about 900,000 cubic yards will have to be removed."

The character of the work required, the method of carrying on the same and the steps to be taken to fix the amount to become due under the contract when fully performed were stated in the specifications as follows:

"The amount of material removed will be paid for by the cubic yard measured in place, and shall be determined by surveys made before dredging is commenced and after it is completed. All surveys and measurements are to be made under the direction of the engineer in charge by persons employed by him for that purpose. The decision of the engineer in charge as to the amount of material excavated and removed, as well as to its location and deposit, shall be final and without appeal on the part of the contractor.

"The location of the work shall be plainly located by stakes and ranges. The level of mean low water as established by the engineer in charge shall not be changed during the progress of the work. The contractor shall be required to supply the lumber for the necessary stakes and ranges, and shall at all times when called upon furnish men and boats to set them and keep them set under the direction of the inspector, the expense thereof to be included in the contract price for the dredging.

"No guarantee is given as to the nature of the bottom, but as far as it is known it is sand, mud, clay, and gravel. Bidders

are requested to satisfy themselves upon this point and to examine all other local conditions, as it will be assumed that their bids are based upon personal information. No extra allowance will be made for excavating material differing from that herein described.

"It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim will be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings, and are invited to make the estimate of quantities for themselves. It is not expected that the actual quantities will vary more than 10 per centum from the estimates.

"Payments will be allowed for actual dredging to twenty-one (21) feet below mean low-water level. Work done outside of the designated lines of excavation or below the specified depth will not be paid for, and any material deposited otherwise than specified and agreed upon must be removed by the contractor at his own expense."

On November 20, 1899, the claimant (dredge company), whose proposal had been accepted, entered into a contract with the United States through General William F. Smith, United States agent, for the performance of the additional dredging, in conformity with the advertisements and specifications referred to in the preceding findings. It was provided in the contract that "the said Bowers Hydraulic Dredging Company shall furnish all labor, machinery and appliances necessary or proper for the faithful execution of the contract, and shall do the work called for, and in all respects carry out and comply with the said specifications for dredging." The sum to be paid was fixed by the contract at 10⅞ cents for each and every cubic yard of material dredged, "measured in place," the said price including removal and redeposit.

Presumably, in consequence of knowledge on the part of the dredge company of a refusal by the Government to pay the New York Dredging Company for the work being done by

it for the removal of any earth from the excavated channel, derived from the sliding from slopes of the same, the dredging company, before commencing work, addressed a letter to General Smith, engineer in charge, requesting to know whether its contract would be construed as excluding payment for removing such earth. General Smith replied "that payment will be made for the quantity of material removed within the designated lines of excavation as determined by measurement before and after the dredging, and that such measurement does not include material which comes in from the sides during the progress of dredging." The letter stated: "I deem it proper to add that this is in conformity with the instructions received from the chief of engineers on the subject." The dredge company thereupon replied, protesting against this construction, declaring that it was not bound thereby, and that its performance of the work must not be construed as an acceptance of the correctness of such interpretation.

The work was commenced. Whenever a payment was made under the contract the dredge company, in receiving the same, asserted that it was entitled to be paid for removing any earth which had fallen into the excavation from the slopes and which had been removed by it, and on payment for such work being refused it protested. On June 21, 1901, while the work on the contract was proceeding, the dredge company made a supplementary contract, increasing the amount to be by it excavated, in accordance with the terms and specifications of the prior contract, from 900,000 to 1,300,000 cubic yards. As the work thereafter progressed under both contracts payments were continued to be made by the Government and received by the dredge company under protest, as before stated, until the work under the contracts was finally completed.

The court below found:

"The amount of material that fell or slid from the sides or slopes of the vertical walls in front of the dredge and that was removed thereby along with the excavated material within the

designated lines for dredging as provided by the contract, was more than 30,000 cubic yards, which, at the contract price of $10\frac{7}{8}$ cents per cubic yard, would amount to over $3,000."

In the opinion delivered by the court below it was said:

"We are therefore of the opinion that the specifications, which are made part of the contract, are plain and unambiguous, and that they not only furnish the basis of *measurement in place* of the material to be excavated, but that the measurements made by the engineer in charge were in strict accord therewith. This being so, any other method of *measurement in place*, even though customary, is excluded by the terms of the contract, and, therefore, expert testimony is not admissible to explain language that needs no explanation."

And for these reasons the right of the dredge company to recover was denied. A new trial was asked, among others, on the ground that error had been committed in not finding the trade meaning of the words, "measured in place," and because the amount of cubic yards of earth which had slid in from the sides or slopes of the excavation while the contract was being performed, and which had been removed by the company, had not been fixed at 260,430 instead of "as above 30,000," as stated in the findings. In addition a request was made that the findings be amended so as to qualify the finding that the price paid should be $10\frac{7}{8}$ cents for each and every cubic yard of material dredged, measured in place, by adding the words, "the same being the trade meaning or understanding of the words 'measured in place.'" In addition it was asked that the finding as to the amount of cubic yards removed of matter that fell from the sides or slopes be increased from above 30,000 to 260,430. The motion for a new trial and the motion to amend the findings were overruled. The court, in its reasons for denying the motion, while stating that certain expert testimony had been offered as to the meaning of the words "measured in place," further stated that it had declined to consider the same and make a finding thereon,

as it concluded, as said in its previous opinion, that the import of the words "measured in place," as used in the contract, was so free from ambiguity that it did not consider the testimony relevant. This was based upon the opinion that whatever might be the commercial signification of the words that meaning could not be imported into the contract for the purpose of destroying its plain and obvious intendment when the terms of the entire contract and the specifications forming part of the same were given their proper weight.

The errors complained of are all embraced under the following headings:

a. The refusal of the court to receive and consider testimony offered as to the trade meaning of the words "measured in place" and its refusal to make a finding on the subject. It being contended that the action of the court in refusing to amend its findings and the statement, in its opinion, that it declined to consider such testimony, adequately preserves the question for review.

b. The refusal of the court to find the precise amount removed of earth which slid in from the sides or slopes, thus leaving the finding uncertain on that subject.

c. The attributing of conclusive efficacy to the action of the officer in charge.

And finally,

d. The construction given by the court to the contract.

It is apparent that the question of construction last stated lies at the foundation of all the assignments, and therefore first commands consideration. We say this because if it be that the court below was correct in its conclusion that the contract gave to the words "measured in place," as therein used, a plain and unambiguous signification, it is obvious that the abstract or commercial meaning of those words, upon the hypothesis that they have such meaning, was rightly held to be irrelevant. And it is equally plain that if the court below rightly construed the contract in the particular mentioned it will be unnecessary to consider the effect which was given

to the action of the officer in charge, since that action was in accordance with the meaning which the court gave to the contract.

Coming to consider the contract, we are of opinion that the court below correctly enforced its self-evident meaning. The requirement that the amount of material removed should be paid for by the cubic yard measured in place, and should be determined by surveys made before dredging is commenced and after its completion, clearly in and of itself established a method for fixing the amount of material which might be excavated, and which was to be paid for, absolutely incompatible with the contention that the contract contemplated that payment should be made for excavated earth which might slide into the channel from the slopes of the same during the progress of the work. And this is fortified by the requirement as to the location of the stakes and the keeping of them continually in place during the performance of the work under the contract. It is, moreover, additionally sustained by the provision, "that no extra allowance will be made for excavating material different from that herein prescribed," and by the stipulations, "that work done outside of the designated lines of excavations or below the specified depth will not be paid for," and "that any material deposited other than that specified and agreed upon must be removed by the contractor at his own expense." When these provisions are read in connection with the specification stating that "no guarantee is given as to the nature of the bottom, but, as far as it is known, it is sand, mud, clay and gravel, bidders are requested to satisfy themselves as to this point, and to examine all other local conditions, as it will be assumed that their bids are based upon personal information" in connection with the statement of the approximate quantity, and the further condition that "no claim will be made against the United States on account of any excess or deficiency, absolute or relative in the same," we think the conclusion is beyond reasonable controversy that the contract, by its express terms and without ambiguity, ex-

cludes the possibility of holding that earth which might slide from the slopes during the excavation was to be paid for by the United States. To separate the words "measured in place" from all the other provisions of the contract in order to give them an assumed or proven abstract trade meaning repugnant to their significance in the contract would be to destroy and not to sustain and enforce the contract requirements. Lest our silence upon the subject may give rise to misconception, we deem it well to observe that even if the original contract was susceptible of a different construction from that which we hold arises from its plain import, such result could have no possible influence on the asserted claim of the dredge company, in so far as that claim is based upon excavation done under the supplementary contract. We say this because that contract was made with the full knowledge of the meaning affixed by the United States to the terms of the contract, and which had been insisted upon in the carrying on of the previous dredging operations.

Affirmed.